

CAN PRIVATE CLASS ACTIONS ENFORCE ECONOMIC REGULATIONS?

DO THEY? *SHOULD* THEY?

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I. INTRODUCTION

Fifty years ago representative class actions – lawsuits in which one or a few persons or entities are permitted to litigate on behalf of large numbers of other claimants who are not before the court – were unique to the United States. Although many jurisdictions permitted parties with similar claims to petition the court to proceed jointly with regard to some or all issues (termed “permissive joinder” in U.S. law²), the notion that a party could come forward of his, her or its own accord, claiming to represent similarly situated others (“the class”) without those others’ active consent was considered radical, a violation of due process or perhaps even of human rights. In the view of many legal scholars and public officials, the right to pursue a remedy for personal injury, property damage, breach of contract, or violation of a constitutional right is akin to a property right and belongs to the injured individual. From this perspective, allowing someone else to claim a legal remedy on behalf of an injured party interferes with individual autonomy.

Today, however, a growing number of countries provide by law for representative class actions. The trend began in Anglo-American countries with common law systems (e.g. Australia, Canada, Israel), and then spread to civil law regimes in Asia, Europe and South America. To date, at least two dozen countries, with political structures ranging from participatory democracies to one-party autocracies, and ideological perspectives ranging from neo-liberal to communist, have adopted some sort of representative class action procedure (see Table 1). Seventeen of the 25 countries with the largest economies, as measured by GDP,³ permit class actions for one or more types of claims. Most of these procedures were adopted in the last twenty years.

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² F.R.C.P. 20.

³ IMF World Economic Outlook, 2014.

Table 1
Countries that Have Adopted Class Actions
For Some or All Types of Claims

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|--|
| NORTH AMERICA |
| Canada |
| Mexico |
| United States |
| CENTRAL & SOUTH AMERICA |
| Argentina |
| Brazil |
| Chile |
| Columbia |
| NORTHERN, CENTRAL & WESTERN EUROPE |
| Belgium |
| Bulgaria |
| Denmark |
| Finland |
| France |
| Italy |
| Netherlands |
| Norway |
| Poland |
| Portugal |
| Spain |
| Sweden |
| MIDDLE EAST |
| Israel |
| AFRICA |
| South Africa |
| ASIA & AUSTRALASIA |
| Australia |
| China |
| Indonesia |
| Japan |
| Korea |
| Taiwan |
| Thailand |
| <i>Countries debating class action proposals: New Zealand, United Kingdom, Switzerland</i> |

A. What Explains the Spread of Class Actions?

The term *legal transplant* is commonly used to discuss the introduction of one country's substantive or procedural law or legal practice into another country's legal system.⁴ Comparative law scholars caution that the term may not precisely describe the process of legal diffusion. Countries that borrow aspects of other countries' legal system rarely do so abruptly. Rather, laws and practices seem to drift gradually from one country to the next in an amorphous process affected by many factors. As diffusion occurs, some features of the original law are dropped, others are substantially modified and new features more compatible with the borrowing country's legal system are added.⁵ For late adopters, the origin of a legal transplant may not be very important.

No one has yet conducted a systematic empirical investigation of the factors that have led to the remarkable spread of the modern class action. What we know is based primarily on anecdotal data: descriptions of policy debates about adopting class actions outside the United States and direct observation of those debates in recent years. Based on these data, the spread of class actions seems to be a story of an exotic legal transplant brought into foreign jurisdictions in a fairly abrupt fashion and with full awareness of its provenance. References to the United States are rife in legislative debates about adopting class action procedures. The proposed procedures are explicitly modeled on U.S. federal Rule 23 and when deviations are proposed, often they also are modeled on amendments that have been (so far unsuccessfully) proposed in the United States.⁶ Class action opponents warn that adopting a class action procedure will lead their country down an undesirable path to frivolous litigation, entrepreneurial lawyering, and undue pressure on corporate decision-making, all of which they associate with U.S. litigation. Class action supporters respond that they are not championing "American-style" class actions, but rather a version of the procedure that has been crafted carefully to capture the virtues of the U.S. class action without its perceived vices.

Political scientists and comparative law scholars have proposed various explanations for the diffusion of social policies generally,⁷ and legal norms and practice in particular, including coercion, economic and political competition, and social learning. Historically, military conquests and imperialism were primary sources of legal transplants. England, France, the United States and other colonial powers imposed elements of their own legal regimes on those

⁴ Alan Watson, *LEGAL TRANSPLANTS* (1973), is credited with first use of the term.

⁵ See, e.g., Michele Graziadei, "Comparative Law as the Study of Legal Transplants," in Mathias Reimann and Reinhard Zimmermann, eds., *THE OXFORD HANDBOOK OF COMPARATIVE LAW* (2006).

⁶ For example, most jurisdictions that have recently adopted class actions require that class members affirmatively opt in to the class, rather than relying on dissident class members to opt out. Class action reformers in the United States have argued unsuccessfully for decades in favor of changing the U.S. rule to require opting in.

⁷ For a review of this literature, see Frank Dobbin, Beth Simmons and Geoffrey Garrett, "The Global Diffusion of Public Policies: Social Construction, Coercion, Competition or Learning?" *Annual Review of Sociology*, Vol. 33, pp. 449-72, 2007.

they overpowered. Over time, these new rules fused with indigenous norms to create new substantive, procedural and evidentiary law. From Yeazell, we learn that U.S. class action law derives from medieval English notions of group action, brought to the United States by English colonists.⁸ However, England later abandoned the idea of representative group legal actions,⁹ and in recent years England has been one of the staunchest opponents of class actions in Europe. There is no contemporary example of a class action procedure being adopted as a result of military conquest or imperialist coercion.

Contemporary diffusion theorists have focused on less coercive mechanisms for the migration of political, social and cultural norms from one nation to another.¹⁰ Some theorists focus on incentives created by external circumstances, for example, when global financial institutions condition aid on the adoption of liberal economic policies, or when national policymakers in one country believe they must change their policies to match other countries' so as not to lose out in economic competition. There are some clear examples of such mechanisms contributing to the diffusion of legal rules and practices. The World Bank promoted the spread of alternative dispute resolution procedures to Latin America.¹¹ Investment arbitration owes its popularity to the inclusion of arbitration provisions in bi-lateral investment treaties that developing nations enter into in the hope of attracting foreign investment.¹² However, contrary dynamics appear to be at work in the case of class actions. In recent years, the U.S. Chamber of Commerce has mounted an extensive campaign to *discourage* other countries from adopting class actions.¹³ Global financial institutions and foreign investors are more likely to take their cues from the U.S. Chamber of Commerce than from civil society supporters of class actions. A different type of competitive incentive may be at work, however, with regard to class actions. Although national decision-makers are unlikely to see class actions as contributing generally to

⁸ Deborah Hensler et al., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000).

⁹ Stephen Yeazell, FROM MEDIEVAL GROUP ACTIONS TO THE MODERN CLASS ACTION (1987).

¹⁰ Dobbins, Simmons & Garrett, *supra*, note 7.

¹¹ Maria Dakolis, THE JUDICIAL SECTOR IN LATIN AMERICA AND THE CARRIBEAN: ELEMENTS OF REFORM, *World Bank Technical Paper 319* (1996) at 37-42 and 52-53.

¹² See, e.g. Viren Michael Mascarenhas, "The Lure of India: Foreign Investment and Investment Treaty Arbitration," Metropolitan Corporate Counsel, October 15, 2014, available at

<http://www.metrocorpccounsel.com/articles/30462/lure-india-foreign-investment-and-investment-treaty-arbitration>. For the background of the establishment of investment treaty arbitration under the aegis of the World Bank, see Ibrahim Shihata, "The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA," 1 Am. U. J. Int'l & Pol'y 97 (1986).

¹³ Institute for Legal Reform, US Chamber of Commerce, "The American Export You Don't Want," June 9, 2009, available at

www.instituteforlegalreform.com/resource/the-american-export-you-dont-want/; *Id.*, "Business Coalition Letter to the Japanese Consumer Affairs Agency Regarding Expansion of Class Actions: Urgent Proposition on the Japanese Class Action System, March 26, 2013, available at

<http://www.instituteforlegalreform.com/resource/business-coalition-letter-to-the-japanese-consumer-affairs-agency-regarding-expansion-of-class-actions/>. For more on the US Chamber's efforts to turn back the spread of class actions, see Deborah Hensler, "Third-Party Financing of Class Action Litigation in the United States: Will The Sky Fall?" 63 *DePaul L. Rev.*, 1101 (2013).

their countries' economic competitiveness, some lawyers and judges have championed the adoption of class actions as a means of bringing more legal business to their courts (and hence legal practitioners), or at least not losing ground to neighboring countries' courts.¹⁴

Other theorists see diffusion of policies and practices, including legal norms, as a species of social learning that is not necessarily instrumentally driven. Over time policies or practices may migrate from one country to another even when the latter has not clearly identified a problem requiring a new policy or when it has little evidence that the borrowed policy will solve its recognized problems. The geographic pattern of the spread of class action procedures suggest that "copy-cat" behavior is one explanation of their diffusion. For example, all but one country in northern Europe have adopted class action procedures although there is little reason to believe that this region of the world has a special need for group legal actions. Leaders of some developing nations may see class actions as an indicator of legal modernity. For example, Indonesia adopted a class action procedure as part of its 21st century legal reform program, although outsiders might think it unwise to initiate a court modernization campaign by adopting a complex and controversial procedure.

Diffusion of policies, including legal transplants, may also result from a rational national decision-making process aimed at finding solutions to emergent problems. For example, the Netherlands adopted a uniquely consensual version of a class action to provide a mechanism for efficiently resolving a multitude of personal injury claims resulting from the use of DES, a pharmaceutical product known to cause cancer in daughters of women who were prescribed it during their pregnancies.¹⁵ The Dutch designers of the procedure have said they looked to the United States for a model of how (and how not) to design their procedure. The German parliament resisted arguments for adopting a class action procedure to address a flood of financial claims against their former national bank, instead adopting a non-representative group litigation regime modeled after an English procedure.¹⁶ The European Union directive on cartel damages adopted in November 2014 was the result of a multi-year consultation process. The directive is widely viewed as facilitating private claims for compensation, for example, by permitting national courts to order defendants to disclose evidence and by establishing a public finding of a violation of cartel law as a rebuttable presumption of liability in a private damages action. Although the final version of the directive does not include a class action provision (as

¹⁴ As the U.S. Supreme Court has restricted securities litigation, some Canadian lawyers and judges have proposed that their provincial courts (all of which have adopted a class action procedure) take up the slack. Similarly, some UK legal practitioners have argued that England needs to adopt a class action procedure to compete with the Dutch courts, which have a uniquely expansive class action regime. See Michael Goldhaber, "The Global Lawyer: Class Actions Aborning in Europe and the UK," *AmLaw Litigation Daily*, October 5, 2014 available at <http://www.litigationdaily.com/id=1202672410377/The-Global-Lawyer-Class-Actions-Aborning-in-Europe-and-the-UK?slreturn=20150113192654>.

¹⁵ Ianika Tankova and Daan Lusingh Scheuleer, "The Netherlands," in Deborah Hensler, Christopher Hodges and Magdalena Tulibacka, eds. *THE GLOBALIZATION OF CLASS ACTIONS*, Annals of the American Academy of Political and Social Science, 2009.

¹⁶ Dietmar Baetge, "Germany," in Hensler, Hodges & Tulibacka, *supra*, note 15.

was recommended during the lengthy deliberations) observers have suggested that if EU member states do not adopt some form of collective procedure within the two year period stipulated for implementing the directive, the Commission will return to this issue in the future.¹⁷

Comparative law scholars have focused on the role of legal elites in promoting legal transplants. Lawyers may advocate for the adoption of other countries' legal rules for disinterested reasons. However, they also may champion legal transplants because the establishment of new procedures will enhance their own professional status and as a corollary their income.¹⁸ The globalization of the legal profession, reflected in the growth of graduate law programs targeting foreign lawyers, has introduced legal practitioners and judges from around the world to legal procedures different from those of their home countries. U.S. law schools attract thousands of graduate law students annually, many of whom learn about US civil legal procedures, including class actions.¹⁹ When they return to their home countries, some of these lawyers may advocate for adopting class actions, either as a sign of modernity or as a solution to a perceived problem.

B. Goals of Class Actions

Proponents of class actions within and outside the United States identify multiple goals for representative group litigation. The most widely cited goal is efficient management of mass claims. By allowing one or more individuals or entities to act on behalf of similarly situated claimants, courts and parties can resolve a large mass of claims arising out of the same legal and factual circumstances in a single action. Although some class action opponents argue that class actions are expensive and time-consuming, when claims number in the thousands or more it is unlikely that the total cost of developing the law and facts in each individual case and adjudicating each case separately will be less than the cost of a single action, even a relatively complex one. The choice therefore is among managing the claims as an aggregate, consigning

¹⁷ Directive 2014/104 of the European Parliament and of the Council, on certain rules governing actions for damages under national law for infringement of competition law provisions of the member states and of the European Union, adopted 26 November 2014; and Bryan Cave, "Significant Increase in EU Antitrust Litigation Likely As EU Council Adopts EU Damages Directive," available at <http://eu-competitionlaw.com/significant-increase-in-eu-antitrust-litigation-likely-as-eu-council-adopts-eu-damages-directive/>

¹⁸ See, e.g., Bryant Garth and Yves Dezaley, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1998).

¹⁹ My global law seminar most recently included lawyers from Chile, Germany, Israel, Switzerland, Thailand, and New Zealand plus a Japanese judge and a Brazilian prosecutor. Switzerland and New Zealand are currently debating whether to adopt class actions, and Germany has adopted a group litigation procedure as their preferred alternative to a class action. The Brazilian prosecutor was pursuing research on reforming Brazil's existing class action procedure. The Japanese judge was preparing himself to preside over class actions when Japan's new class action law goes into effect.

them to inefficient or lower quality individual dispute resolution or ignoring them altogether.²⁰ The class action is one mechanism for aggregate resolution, albeit not the only one.²¹

The second most widely cited goal of class actions is access to justice, particularly for claimants who have suffered economic losses as a result of illegal acts, but whose losses are too small to warrant costly litigation. Small individual losses are the characteristic consequence of violations of consumer protection, anti-trust and employment law but may also occur as a result of violations of securities law. Because in most jurisdictions individual litigation costs are substantial, individuals and small businesses that have lost hundreds or even thousands of dollars as a result of these sorts of corporate misbehavior have no option but to “lump it.” Although small relative to the transactions of institutions and affluent individuals, such sums are significant to many of those who suffer such losses. By bringing scale efficiencies to the dispute resolution process, class actions make litigation of small claims economically viable. In some jurisdictions, such as Australia and Canada, courts have explicitly recognized increasing access to courts for claimants with relatively small value claims as a goal of class actions.²² Class action opponents in the United States who argue that class action procedures open the courthouse doors too wide are usually careful to say the availability of class actions encourages “frivolous” litigation.²³

Improving access to the courts for claimants with small losses can be justified as a matter of fairness. Participants in the European debate about class actions have adopted the term “collective redress” to refer to the goal of ensuring access to dispute resolution, both court-based

²⁰ Deborah Hensler, “Justice for the Masses? Aggregate Litigation and Its Alternatives,” in Judith Resnik and Linda Greenhouse, *The Invention of Courts*, 143 (3) *Daedulus*, Summer, 2014; see also Deborah Hensler, “How Economic Globalisation Is Helping To Construct A Private Transnational Legal Order,” in Sam Muller et al., eds. *THE LAW OF THE FUTURE AND THE FUTURE OF LAW*, Torkel Opsahl, 2011.

²¹ Others include multi-district litigation (MDL) in the United States, the Group Litigation Order (GLO) in the United Kingdom and the Capital Market Model Case (KapMug) procedure in Germany. See Hensler, Hodges & Tulibacka, 2009, *supra* note 15.

²² P DAWSON NOMINEES PTY LTD v MULTIPLEX LTD and Another 2007 FCA 1061 FEDERAL COURT OF AUSTRALIA 242 A.L.R. 111 July 19, 2007 (“On the second reading of the Federal Court Amendment Bill 1991 (Cth) which introduced Pt IVA [the Australian Federal Class Action] the Attorney-General said that the class action procedure was needed for two purposes; “The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person’s loss is small and not economically viable to recover in individual actions ... The second purpose ... is to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions.”); WESTERN CANADIAN SHOPPING CENTRES INC. v. DUTTON, File No.: 27138, SUPREME COURT OF CANADA, [2001] 2 S.C.R. 534; 2001 SCC 46; 2001 S.C.R. LEXIS 46, July 13, 2001 (“Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied.”)

²³ See, e.g., John Beisner, Jessica Miller & Gary Rubin, *Selling Lawsuits, Buying Trouble: Third Party Litigation Financing in the United States*, U.S. Chamber of Commerce Institute for Legal Reform (2009) at 4. Available on the web at <http://ilr.iwssites.com/uploads/sites/1/thirdparty litigation financing.pdf>

and out-of-court, when mass harms produce many small-value claims. Framing access as “redress” focuses on the compensatory goal of legal dispute resolution. Many class action advocates, however, view ensuring court access for claimants with small – or even large -- losses as a means of bolstering enforcement of economic regulations when public enforcement is absent or insufficient. The Supreme Court of Canada has identified deterrence as one of the goals of Canadian class actions.²⁴ During debate in Australia’s parliament about adopting class actions, the then Minister of Justice and Consumer Affairs asserted that the ability of shareholders to bring class actions “will be a great aid to the more formal regulators, such as the Australian Securities Commission.”²⁵ Whether regulatory enforcement ought to be a goal of collective litigation (whatever the size of claimed losses) is central to controversy over the use of class action procedures in virtually every jurisdiction that has considered adopting, expanding or restricting their use.²⁶

C. Research Questions and Approach

This essay focuses on the use of private class actions to enforce economic regulations. The regulations of interest include employment and consumer protection, product safety, anti-trust and securities law. There is a vast theoretical literature on regulatory enforcement that straddles multiple disciplines, including economics, political science, psychology and law. Most theorists agree that effective enforcement requires a combination of self-regulation by market actors, public enforcement by regulatory agencies and criminal prosecutors, and private litigation. However, theorists, practitioners and public policymakers disagree about the relative roles to

²⁴ *Hollick v. Toronto (CITY)* (2001) 205 DLR (4th) 19, 28-29 (“Class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behavior to take full account of the harm they are causing, or might cause, to the public.”)

²⁵ Australia Commonwealth Parliamentary Debates, Nov. 13, 1996, cited in Michelle Welsh and Vince Morabito, “Public v Private Enforcement of Securities Laws: An Australian Empirical Study, 14 *Journal of Comparative Legal Studies* 39 (2014) at 43. However, the final wording of the act does not mention deterrence (“behavior modification”) as a goal. *Id.*

²⁶ Hensler, Hodges & Tulibacka, *supra* note 15. William Coleman, a prominent member of the 1966 committee that drafted the contemporary version of the American Rule 23, asserted that strengthening private enforcement of statutes and regulations was not among the committee’s goals. William Coleman, 4 *Working Papers of the Advisory Committee on Proposed Amendments to Rule 23*, 456 (1997). However, well before the adoption of the modern version of Rule 23, legal scholars recognized the use of class actions for regulatory enforcement. See e.g. H Kalven Jr and M Rosenfield, “The Contemporary Function of the Class Suit,” 8 *U Chicago L R* 684 (1940-41).

David Crane argues that at least in the antitrust domain, private enforcement is unsuccessful in meeting *both* compensation and deterrence goals. Rather than relying exclusively on public enforcement, however, Crane argues that the goal of private enforcement ought to be to “negotiat[ing] forward-looking solutions,” with limited judicial involvement. *Id.*, “Optimizing Private Antitrust Enforcement,” 6 *Vand. L. Rev* 675 (2010) at 677, 716-717. Crane’s proposal somewhat resembles Sabel & Simon’s prescription for public law litigation. See *Charles Sable & William Simon, Destabilization Rights: How Public Law Litigation Succeeds*, 117 *Harv. L. Rev.* 1016 (2014). Whether and under what conditions, parties could and would collaborate to design and implement remedies is uncertain. See Margo Schlanger & Pauline Kim, “The Equal Employment Opportunity Commission and Structural Reform of the American Workplace,” *University of Michigan Law School Public Law and Theory Research Paper* No. 340 (August 2013) at 3 – 6.

assign public and private actors. This essay addresses three questions that are relevant to that issue:

- 1) *Can* the modern class action, modeled after the U.S. federal Rule 23, enforce economic regulations?
- 2) In the jurisdictions in which they have gained the most traction *do* class actions help enforce economic regulations, and if so, under what circumstances? and
- 3) *Should* public policy makers permit private class actions that have as their primary purpose enforcing economic regulations?²⁷

The essay deals solely with class actions brought by private actors, excluding civil enforcement litigation brought by public regulatory agencies such as the U.S. Securities and Exchange Commission (SEC) and the Australian Securities and Investment Commission (ASIC) and *parens patriae* suits brought by state Attorneys General in the US, which are sometimes analogized to or confused with private class actions.²⁸ Section II describes the key features of class actions and discusses how the formal design of class action procedures and the interaction of class action rules with other legal rules affect the potential of private class actions to enforce economic regulations. Section III marshals the available empirical evidence on how class actions work in practice, which come from the United States, Australia, and Israel. These data indicate the frequency of class action lawsuits over time and among jurisdictions, how they are disposed (e.g. settlement vs. adjudication) and their legal outcomes. But the section concludes that the available evidence is too incomplete to determine the general effectiveness of private class actions in regulating different sectors of the economy. The inadequacy of the evidence demonstrates that policy-makers should be cautious about sweeping assertions about the consequences of class actions, either for good or ill. Sec. IV outlines the ingredients of an empirical research program that would better inform public and private decision-makers about the uses and outcomes of private class actions. Absent better data on the relative contributions of public and private enforcement mechanisms to economic regulation, under different circumstances, Sec. IV argues that we should craft regulatory policies that promote redundancy.

II. CAN PRIVATE CLASS ACTIONS ENFORCE ECONOMIC REGULATIONS?

²⁷ A similar set of questions regarding class actions against public actors merits discussion. In the United States, “social impact” litigation that attempts to use class actions to achieve sentencing reform, welfare reform, education reform and a host of other social policy goals has evoked almost as much controversy as private damage class actions. My essay leaves questions about the proper role of class actions in regulating public actors’ behavior for another day. My essay also omits discussion of the class action as a compensatory mechanism, except as this relates to the regulatory enforcement goal.

²⁸ See e.g., Margaret Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys’ General*, 126 Harv. L. Rev. 486 (2012).

As a formal matter, private class actions can directly affect private actors' economic behavior by enjoining them from or directing them to pursue specific policies. Injunctions may force economic actors to stop engaging in illegal behavior; by clarifying the laws that govern the economy declaratory judgments can shape future economic behavior. In the United States, Rule 23 (b) (2) provides for injunctive class actions.²⁹ Many other jurisdictions that have adopted class actions restrict the remedies obtainable to injunctive and declaratory relief in all or most circumstances.³⁰

Class actions can also regulate economic behavior indirectly by requiring market actors to pay damages for violating the law. The notion that damage class actions can deter misbehavior is a straightforward extension of the economic analysis of tort law.³¹ Deterrence is a product of the likelihood that those who are injured by an employer's, manufacturer's or service provider's misbehavior will bring a lawsuit in the form of a class, the likelihood that the class will prevail by settlement or adjudication, and the value of the damages (if any) the defendant pays. From a deterrence perspective, whether the class members recoup their damages or whether the defendant pays an equivalent sum to others (e.g. in the form of *cy pres* remedies) or indeed to class counsel is irrelevant.³² The goal is to incentivize economic actors to include the expected value of injuries or losses caused by their illegal behavior (including their own legal expenses) in their calculus when deciding whether and how to design, produce, distribute and market a product or service and how to treat their employees.³³

²⁹ Prior to recent U.S. Supreme Court decisions, injunctive class actions were the most common form of civil rights class actions on behalf of employees and customers seeking elimination of discriminatory practices. In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (U.S. 2011), the Court de-certified an employment discrimination class action brought by female employees of the retail giant. A divided court held that the claims did not satisfy the commonality requirements of Rule 23(a). At the same time, the justices unanimously held that 23(b)(2) could not be used to pursue the class members' damages claims.

³⁰ Deborah Hensler, *The Globalization of Class Actions: An Overview* in Hensler, Hodges & Tulibacka, 2009, *supra*, note 15.

³¹ See, e.g. Geoffrey Miller, "Group Litigation in the Enforcement of Tort Law," in Jennifer Arlen, ed., RESEARCH HANDBOOK ON THE ECONOMIC ANALYSIS OF TORT (2013); Guido Calabresi, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); Steven Shavell, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987).

³² John Connor, "Optimal Deterrence and Private International Cartels," April 2006, SSRN-ID787927, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=787927 (noting that this view of deterrence is not universal but widely shared by "Chicago-school" economists)

³³ Some contemporary regulatory theorists have proposed an enforcement strategy that relies less on economic sanctions and more on building reciprocal relationships with regulated entities to encourage compliance. "Responsive regulation" scholars propose a "pyramid" of responses to regulatory violations in which regulators first attempt to find mutually acceptable changes in behavior and move on to increasingly burdensome demands if and only if the regulatory entities fail to comply. At the apex of the pyramid are criminal prosecution and monetary sanctions. First proposed by Ian Ayres and John Braithwaite, responsive regulation has been taken up by a large number of scholars and policymakers worldwide. *Id.*, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992). Two perspectives on responsive regulation have emerged, one relying on a game theoretic approach in which regulators respond positively or negatively to the regulated entities depending on the latter's behavior ("tit-for-tat") and the other relying on a "restorative justice" approach in which the regulators attempt to build a trusting and mutually respectful relationship with the regulated entities.). See Vibeke Nielsen

U.S. class action law is generally viewed as more supportive of regulatory enforcement class actions than the rules and law of other jurisdictions.³⁴ However, recent decisions by the U.S. Supreme Court have cut back sharply on the potential for regulatory enforcement via class actions in virtually all realms of economic behavior including employment,³⁵ consumer transactions,³⁶ anti-trust,³⁷ and securities fraud.³⁸ Although many commentators assume that mass personal injury claims such as product liability, toxic exposure and catastrophic accident claims are routinely treated as class actions in the United States, U.S. federal courts have long disfavored certifying these as class actions.³⁹

and Christine Parker, “Testing Responsive Regulation in Regulatory Enforcement,” 3 *Regulation and Governance* (2009) Using Australian data on anti-trust enforcement, the authors found it difficult to identify instances of systematic application of “tit-for-tat” responsive regulation and no measurable effects of either “tit-for-tat” or restorative justice-based responsive regulation on compliance. Responsive regulation theorists note that civil society may play an important role in assisting public regulators in persuading the regulated to comply, particularly in jurisdictions where public regulators are poorly funded, captured, or corrupt. See John Braithwaite, “Responsive Regulation and Developing Economies,” 34 *World Development* 884 (2006).

³⁴ Traditionally, such suits have been referred to as “private attorneys general” suits. See John Coffee, “Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working,” 42 *Ms. L. Rev.* 215 (1983). See also, *Id.*, “Understanding the Plaintiff’s Attorney: the Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions,” 86 *Colum. L. Rev.* 669 (1986). Morris Rattner argues that the classic model of entrepreneurial class action lawyering ignores firm organizational factors that may militate against fee maximization in individual class action lawsuits. *Id.*, “A New Model of Plaintiff Class Action Attorneys,” 31 *Rev. Litig.* 1 (2012).

³⁵ See, e.g. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (U.S. 2011) (decertifying a class of female employees charging gender discrimination in promotion and pay.) Previous decisions upheld contractual requirements to arbitrate a wide range of employees’ rights claims. See e.g. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (U.S. 1991) (holding an employee who signed an employment contract containing an arbitration clause can be compelled to arbitrate claims under the *Americans with Disabilities Act*); *Circuit City Stores v. Adams*, 532 U.S. 105 (U.S. 2001) (holding that an African-American employee who signed an employment contract containing an arbitration clause can be compelled to arbitrate claims under Title VII of the *Civil Rights Act*.) Subsequent decisions upheld arbitration clauses barring any form of collective proceeding.

³⁶ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (U.S. 2011) (upholding an arbitration provision in a consumer contract prohibiting any type of collective proceeding.)

³⁷ *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (U.S. 2013) (decertifying an anti-trust class on the grounds that the damage model was not consistent with the class definition), and *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (U.S. 2013) (holding the fact that anti-trust damages would be too expensive to prove on an individual basis was not sufficient to void an arbitration clause prohibiting any form of collective proceeding). On trends in U.S. Supreme Court decisions on private regulatory enforcement and their correlation with judicial ideology, see Stephen Burbank & Sean Farhang, *Litigation Reform: An Institutional Perspective*, 162 *U. Penn. L. Rev.* 1543 (2014).

³⁸ In 2014, the U.S. Supreme Court upheld the “fraud-on-the market” theory – the so-called *Basic* presumption, enunciated in *In Basic Inc. v. Levinson*, 108 S. Ct. 978, (1967) -- that has provided the underpinning for securities class actions for the past several decades, but enhanced the defendant’s ability to introduce evidence prior to class certification to rebut the application of the theory to the lawsuit against it. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (U.S. 2014). Although the Court’s decision was unanimous, three justices concurred in the judgment on the case only, dissenting on the core issue of the continued viability of the fraud-on-the-market theory. Justices Alito, Scalia and Thomas held that the Court’s decision in *Basic* should be overturned.

³⁹ *Amchem Prods. v. Windsor*, 521 U.S. 591 (U.S. 1997) (decertifying a class of workers exposed to asbestos products).

The regulatory enforcement potential of all class action procedures depends primarily on five features:

- Their legal scope (What kinds of cases can be brought as class actions?)
- Their standing rules (Who can represent the class?)
- Whether the procedure is “opt-in” or “opt-out” (How is class membership determined?)
- The type of remedy available (What can successful class members obtain?) and
- Legal financing rules (Who pays the legal costs of bringing class actions?).

Scope, standing, the choice between opt-out and opt-in provisions and the type of remedies available to successful class members are essential aspects of any class action procedure. But the prevailing legal financing rules, which policymakers generally have not modified when they adopt class action procedures, significantly affect whether class actions (whatever their design) will be utilized, under what circumstances and with what consequences. Indeed, the adoption of a class action procedure is rarely accompanied by other changes in a jurisdiction’s substantive or procedural law that may restrict its use. The undermining of class action goals by the failure to change other aspects of a legal regime that are essential to the success of class actions is a classic example of the barriers to successful implementation that are encountered by legal transplants.

A. Scope

In the United States class actions are *trans-substantive*, meaning that absent case-specific restrictions, they can be used to regulate diverse behavior, including employment practices, consumer transactions, compliance with anti-trust (anti-competition) and securities law and other financial practices. In many other jurisdictions that have adopted class actions, however, class claims only are authorized for violations of particular statutes, such as those dealing with securities fraud, anti-trust/cartel regulation or consumer protection law. Often authorization for a representative class action is included in the substantive statute, rather than in a separate procedural rule. Among common law jurisdictions, trans-substantive class action rules prevail, reflecting a general proclivity for trans-substantive procedures in Anglo-American legal regimes. In Asia, most class action procedures apply only to securities fraud or consumer protection,⁴⁰ while the picture in Northern and Western Europe and Latin America is mixed. It is common for countries to adopt a limited scope procedure and then, over time, if it is deemed successful, to broaden it to cover other areas of law.⁴¹ For example, Israel first limited the scope of class actions through individual substantive statutes but later adopted a procedure that can be used for many different types of substantive claims, although it is not completely trans-substantive. Belgium and France, which long resisted the European trend towards class actions, both adopted class action procedures in 2014, but limited their application to consumer protection. Japan is

⁴⁰ Indonesia is an exception to this pattern; there class actions have been used primarily in environmental damages and mass accident cases. Mas Achmad Santosa, “Indonesia,” in Hensler, Hodges & Tulibacka, 2009 *supra* note 15.

⁴¹ Hensler, 2009 *supra* note 30 at 14.

another jurisdiction that had strong reservations about class actions; in 2013 it adopted a class action procedure for consumer protection cases.

B. Standing

In Australia, Canada, the United States and some other jurisdictions an individual, NGO or business entity may come forward and offer to represent a similarly situated group of individuals or organizations. The court may review the capacity of the party to adequately represent class members' interests (including whether the party is "typical" of the class) but the representative need meet no other requirements. In other jurisdictions, only properly incorporated organizations (e.g. Italy), specially vetted associations (e.g. Taiwan), special purpose foundations (e.g. the Netherlands) or a government official (e.g. Brazil, Denmark) have standing to represent a class in some or all circumstances. Limiting standing to represent a class to government officials or parties approved by government officials makes it less likely that a class action can go forward when public officials themselves would prefer not to enforce regulations against economic actors. In theory, government officials would base such decisions on legal analysis, perhaps tempered by cost-benefit considerations. In practice, the officials may be captured by the interests they are authorized to regulate. In such instances, a class action procedure that requires officials' authorization to go forward is unlikely to contribute to regulatory enforcement.⁴²

C. Opt-out vs. Opt-in

A highly controversial aspect of U.S. damage class actions is the opt-out rule that permits one or a few parties to represent a class of hundreds, thousands or even millions without those class members actively consenting to the action.⁴³ The enormous potential size of some opt-out classes – and the related potential damages – increases defendants' risk, which critics assert increases defendants' likelihood of settling non-meritorious claims (popularly termed "blackmail settlements").⁴⁴ However, when individual losses are relatively modest, it is unlikely that many class members will invest the effort required to "opt in" to a class action. Other things equal, therefore, we would expect opt-in class actions to provide less deterrence in situations where defendants can garner large financial rewards from imposing small but illegal additional costs on individuals and businesses. Such individually small losses for class members accompanied by very large gains for corporations are characteristic of consumer suits and some anti-trust suits.

⁴² *Id.* In principle a representative organization deemed "safe" by government officials and market actors at one time might become more assertive subsequently, perhaps to the point of over-enforcement of regulations. Even if this contradicted government policy, it might be politically difficult for a government to remove its official sanction from such an activist representative organization. I do not know of any jurisdiction that has experienced this to date.

⁴³ U.S. class actions for injunctive relief do not provide for opting out; the class is defined by counsel as approved by the judge.

⁴⁴ The available evidence is inconsistent with assertions that such settlement are common. Hensler, 2013, *supra*, note 13.

Australia, Canada, and Israel permit opt-out class actions but most countries' procedures insist that class members pro-actively indicate their desire to participate in the class in all or most circumstances.⁴⁵

D. Damages

Economic actors who violate the law in the United States may be subject to statutory or common law damages.⁴⁶ The risk of large damages, including punitive damages, is perceived as especially high in cases that are tried to jury, although outsized damages awarded by juries may be reduced by the trial judge or an appellate court. In the United States, the fact that a claim is filed in the form of a class action does not restrict damage enhancements such as statutory treble damages and common law punitive damages, and class representatives have the same right to jury trial as individual plaintiffs. The availability of exceptional damages, plus the potential for a jury trial, means that the expected value of many U.S. damage class actions is huge.⁴⁷ In theory, this potential should enhance the deterrent potential of class actions – in the view of corporate critics, far beyond the optimum. If class members can only obtain injunctive or declaratory relief, as is true in many jurisdictions, injured individuals and entities will have lesser incentives to come forward and potential wrongdoers may decide that the expected value of a penalty for violating the law is too small to justify compliance.⁴⁸ The low rate of class action litigation in countries that formally provide a class action procedure (e.g. Denmark, Norway and Sweden) is widely attributed to the unavailability of monetary remedies. In most jurisdictions, punitive (exemplary) damages are never or rarely available, in individual or collective litigation.

E. Legal Financing

The U.S. legal financing regime is very favorable to class action litigation. Except in cases where statutory fee-shifting prevails, each side pays its own costs, eliminating any risk of adverse costs for class members. A lawyer is allowed – indeed, expected – to represent the class on a speculative basis. Because law firms must invest their own funds to maintain the class action and the firm will receive reimbursement of its expenses only if the litigation succeeds, the system favors resource-rich firms that have been successful in prior litigation. As a result, the class is likely to obtain better than average representation. If the class prevails, by settlement or trial, the judge will award counsel fees and expenses and all class members will pay a share of these, directly or indirectly.⁴⁹ As a result, there is no financial disincentive for a class member to

⁴⁵ Hensler, 2009, *supra* note 30, at 15-16.

⁴⁶ For examples of statutory damage provisions in diverse domains of economic activity, see Bert Huang, *Concurrent Damages*, 100 Va. L. Re. 719 (2014) at Fn 9.

⁴⁷ See Huang, *supra* note 47 at Fns. 18,19, & 20 (identifying legal restrictions but noting cases where the potential for excessive damages evoked judicial concern)

⁴⁸ *Id.*, at 14.

⁴⁹ Some discussions of class action outcomes distinguish between cases in which attorneys' fees are calculated explicitly as a share of the total settlement fund and cases in which attorney fees are calculated separately "on top

step forward and offer herself as a class representative.⁵⁰ Critics of U.S. class actions argue that the intersection of these legal financing rules with class action rules produces excessive numbers of class actions, many of which are “frivolous,” as well as settlements that reward class action lawyers far more than the settlement is worth to class members. Under U.S. class action rules judges are charged with deciding what plaintiff counsel should receive for their time and expenses, when the class prevails. Legal doctrine provides for two approaches to calculating fees, the “percent of fund” method, akin to contingency fees plaintiffs agree to pay in ordinary personal injury litigation, and the “lodestar” method, that yields the product of attorney hours, typical hourly rates in the jurisdiction in which the class action was litigated (the “lodestar”), and a discretionary “multiplier” that may enhance (or reduce) the product to reflect the lawyer’s effort and the riskiness of the case.⁵¹

Many other jurisdictions that have adopted class action procedures have legal financing regimes that are far less favorable to class litigation. In jurisdictions that require losing parties to pay the prevailing parties’ fees this risk looms very large for representative plaintiffs, especially if they alone among the class members are responsible for costs and have to post bond against that possibility. In jurisdictions in which lawyers may not represent clients on a speculative basis (e.g. “no win, no fee”), representative plaintiffs must contract to pay the class counsel’s hourly fees and expenses as the case moves forward, as well as potential adverse costs, a daunting proposition. If the representative plaintiff is an individual who contracts with a law firm to prosecute the class action while other class members get a “free ride,” it is more attractive for class members to hang back than to come forward to offer themselves as representative plaintiffs. In jurisdictions that grant standing to represent a class only to associations, not all NGOs have sufficient resources to shoulder these costs and risk, and even those that do may worry about their members’ reactions to the toll on the association’s resources if the class does not prevail. In these sorts of legal financing regimes, class actions are more likely to be under-utilized than over-utilized.⁵²

Third-party litigation financing has emerged as a response to limitations on class action litigation imposed by legal financing rules outside the United States. In Australia, where the notion of investing in commercial litigation seems to have first taken hold, litigation financiers

of” or in addition to the settlement fund. As a practical matter, defendants always focus on the total amount they are committed to pay, without regard to its division between class members and attorneys.

⁵⁰ U.S. class representatives may receive a financial incentive to compensate them for their involvement in the litigation, but such incentives are deliberately modest so as to avoid a conflict of interest between the class representative and class members. See, e.g., Memorandum and Order, *In re Payment Card Interchange Fee and Merchant Discount Anti-trust Litigation*, Case 05-MD-1720, January 10, 2014.

⁵¹ MANUAL FOR COMPLEX LITIGATION FOURTH, 2004, §21.7.

⁵² Interestingly in view of international criticism of U.S. class counsel fees, judges outside the United States generally do not review attorney fees in ordinary or class litigation, on the grounds that they are strictly governed by attorney-client contracts. Bars against contingency fees or other speculative fee arrangements are imposed by national bars’ professional responsibility rules. Lawyers sometimes find ways around these restrictions, for example, by charging modest hourly rates plus “success fees” when their clients prevail.

contract with class members to pay class counsel and take on the risk of adverse costs in return for a share of any damages the class member may obtain. Although Australian law does not permit lawyers to charge fees calculated as a share of damages, the litigation financiers are not subject to such restrictions. The financiers' contracts with class members have transformed what is formally an opt-out class action regime into an opt-in regime, as the financier only offers support to those with whom it contracts. "Closed classes" comprising all of the financiers' customers have been challenged but upheld by Australian courts as a necessary mechanism for overcoming the financial barrier to class litigation that would otherwise exist.⁵³ In Europe a different mechanism has emerged: corporations with anti-competition claims assign their claims to a special purpose financial entity that hires lawyers to represent it in a single action for the total value of those claims, obviating the need for a formal procedure for collective litigation.⁵⁴ Third-party financing has emerged only recently in the United States, and financiers claim to be steering their investment away from class actions.⁵⁵ However, many financiers contract directly with law firms that represent plaintiffs in mass litigation, both class actions and non-class aggregate litigation.

In addition to legal financing rules, other aspects of civil legal regimes may facilitate or hinder regulatory enforcement litigation, whether individual or in class form. Relaxed jurisdictional rules allow plaintiffs to choose friendlier fora and relaxed disclosure ("discovery") rules make it more likely that plaintiffs will be able to obtain evidence to support their liability and damage claims. Longer statutory limitations give plaintiffs more time to uncover wrongdoing and file claims.⁵⁶

III. DO CLASS ACTIONS ENFORCE ECONOMIC REGULATIONS?

To enforce economic regulations using class actions, class members or their representatives must identify instances of legal violations by economic actors, file suits to challenge the violations, and prevail either by winning a trial verdict or negotiating a settlement that forces a change in behavior or imposes financial costs on those actors (or both). Defendants must also comply with court judgments and settlement terms. If class actions are the *only* deterrent mechanism, and the goal is optimal deterrence, the costs imposed by class actions on defendants (including monetary remedies and legal expenses) should reflect the costs imposed on class members by the defendants' illegal behavior, adjusted upward in order to take into account the

⁵³ *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* (2007).

⁵⁴ Damien Girardin & Laurie-Anne Grelier, "Cartel Damages Claims in the European Union: Have We Only Seen the Tip of the Iceberg?" December 2, 2013, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2362386.

⁵⁵ Hensler, 2013, *supra* note 13.

⁵⁶ Geradin & Grelier, *supra*, note 54 (discussing why the UK, Germany and the Netherlands are attractive jurisdictions for plaintiffs seeking cartel damages).

likelihood that victims will not file claims for all instances of similar violations.⁵⁷ Higher costs than the adjusted amount will over-deter the targeted behavior and lower costs will under-deter the behavior. If public prosecution -- criminal charges or civil enforcement actions-- accompanies private class actions, and if victims' compensation is irrelevant, then the optimal deterrence calculation arguably should take into account the expected value of criminal and civil penalties (and the costs of defending against these) as well, and the costs class actions impose should equal whatever fraction remains. It follows that assessing the contribution of private class actions to optimal deterrence requires data not only on class action claiming rates and outcomes but also on the likelihood and outcomes of criminal and civil enforcement actions. For each enforcement mechanism we need to know as well the accuracy of decisions to enforce – i.e. the ratio of false negatives to false positives – and the relationship between the total sum of penalties, fines and damages paid by the defendant and the costs that the defendant's illegal behavior imposed on others. In addition, a full accounting of the contribution of private class actions to regulatory enforcement should include the value of information uncovered by private enforcement suits to public enforcers and the effect of private suits and the publicity attending them on public actors' decisions to pursue enforcement actions.

The empirical data to perform this complex set of calculations do not exist for any jurisdiction that has adopted representative class actions, including the United States.⁵⁸ Pointing to individual instances of perceived litigation failure, some critics of regulatory enforcement class actions conclude that U.S. class actions fail to perform a useful regulatory function; pointing to different examples, others argue to the contrary that class actions play an important regulatory role. However, without data on the frequency of legal violations, the rates of private enforcement relative to violations via class actions and public enforcement via the criminal justice and civil enforcement regimes, and the direct and indirect outcomes of both, it is impossible presently to draw evidenced-based conclusions about the general utility of class actions in the United States or elsewhere for enforcing market regulations.⁵⁹

⁵⁷ Deterrence theorists might also support downward adjustments to reflect indirect costs of litigation, such as loss of market share and diminished stock values that often occur in the immediate aftermath of high profile class litigation. See Deborah Hensler, "The Socio-Economics of Mass Torts: What We Know, Don't Know and Should Know, in Jennifer Arlen, ed., RESEARCH HANDBOOK OF ECONOMIC ANALYSIS OF TORTS (2013). The goal of optimal deterrence is for the economic actor to "internalize" the costs of its decisions and engage in the relevant behavior – e.g. manufacture and distribute the drug, contract with a worker or consumer, etc. – when the benefits outweigh these costs.

⁵⁸ This situation is not limited to class actions; most jurisdictions do not collect sufficient data to support a cost-benefit analysis of the effects of individual litigation either. But at least in the United States, there have been attempts to systematically measure claiming rates and outcomes of certain types of individual civil litigation in selected jurisdictions and time periods. Perhaps because of their relative rarity in the United States and their relatively recent introduction elsewhere, class actions have been subject to far less empirical research.

⁵⁹ Most jurisdictions that have adopted class actions have even poorer statistics than U.S. courts. The authors of the country reports included in Hensler, Hodges & Tulibacka (2009) *supra* note 15 were asked to provide data on the number and type of class actions that had been filed in their jurisdictions. In some jurisdictions where only a small number of class actions had been filed the authors were able to describe each one. However, all of the

Rather than throwing up our hands in despair at this sorry state of affairs we could allow it to motivate us to develop an empirical research program that would improve our understanding of private and public enforcement and the relationship between the two. In Sec. IV. I suggest the outlines of such a program. It is unlikely, however, that even highly motivated and well-subsidized analysts will be able to come to firm conclusions any time soon about the contribution of class actions to regulatory enforcement, much less the circumstances under which private regulatory enforcement class actions have a net benefit to society.⁶⁰ As a result we should be cautious about accepting the sweeping assertions offered by participants in public policy debates about the net benefit (or cost) of using private class actions for regulatory enforcement, relative to public enforcement.

The remainder of this Section presents the available data on the number and type of regulatory enforcement class actions, their outcomes and the relationship between private class actions and public enforcement. Although these data do not answer the ultimate cost-benefit question regarding regulatory enforcement class actions, they do provide some insights into the ways that class action procedures are implemented on the ground. Each of the topical subsections begins with a summary of the findings, which is followed by detailed information for the jurisdictions for which information is available.

A. Frequency and Type of Class Actions

In many jurisdictions that have adopted class actions, only a handful of cases have been filed,⁶¹ at least in part for reasons discussed *supra* in Sec. II. If policymakers in those jurisdictions intended for class actions to help regulate the economy, it is unlikely that the procedure is doing so. In a few jurisdictions, available data indicate more frequent use of the procedure. The only comprehensive national data are for Australia, compiled by Morabito under a grant from the Australian Research Council, and for Israel, compiled by Klement et al. for the Israeli courts. Both Australia's and Israel's class action rules are quite similar to U.S. Rule 23, although their legal financing rules are more restrictive than U.S. financing rules. Australia's federal class action statute became effective in 1992, Israel's general class action statute became

authors wrote that there was no ongoing public effort to collect statistics on class action filings or outcomes in their jurisdictions. Nicholas Pace cited data from special reports on U.S. class actions that are discussed in this Section *infra*; Vince Morabito reported that he was in the midst of collecting comprehensive data on Australian class actions collected under a grant from the Australian Research Council, supplemented by contributions from corporate and plaintiff law firms, and Australia's leading third-party litigation financier, Bentham IMF. The results of his research are discussed in this Section as well.

⁶⁰ While the challenges are daunting, they are perhaps no less daunting than the situation we faced some 50 years ago with regard to the effectiveness of health care delivery. Today, although health policy analysts are far from knowing everything needed to make rational policy choices they are able to provide policy-makers with some evidence of what "works" and what does not, and what the costs and benefits are of major health interventions.

⁶¹ Hensler, Hodges & Tulibacka, (2009) *supra* note 15.

effective in 2007.⁶² Less complete data are available for the United States, where the current version of the federal class action rule was adopted in 1966.

The Australian, Israeli and U.S. data cover different time periods and are derived from different sources; as a result, they are not precisely comparable. Taken together, the data indicate that even jurisdictions with quite similar class action regimes may have quite different experiences with regard to the use of class actions. Australian class actions are as rare as the platypus, while in Israel the most recent per capita filing rate was higher than the per capita rate in the same year for all civil litigation in California state courts.⁶³ Although economic class actions predominate in all three jurisdictions, the balance of large value cases (e.g. securities and other financial investment class actions) and smaller value cases (e.g. consumer protection class actions) differs dramatically among them. Whether this difference reflects differences in legal financing rules, judicial interpretation of class action rules, or other factors is not clear; most likely, multiple factors are at work, including perhaps the maturity (or lack thereof) of the rule itself.

1. Number of class action filings

From 1992 – 2014, 329 class actions were filed in Australia’s federal courts, an average of about 15 class actions per year.⁶⁴ The average number of annual filings was somewhat higher during the first half of the program’s life and somewhat lower during the more recent half. The largest number of class actions filed in a single year was 31, in 1998, the seventh year of program operations; the smallest was 4, in 2005, the fourteenth year of program operations. The total number of filings in the most recent reporting year 2013-2014 was 19. From 1992 – 2008, annual class action filings amounted to about one percent of total annual civil case filings.⁶⁵

⁶² Some states in Australia also authorize class actions. The data presented in this essay relate solely to federal class actions, which far outnumber those brought under state law. Prior to Israel’s adoption of a general class action statute, class actions were authorized in a number of substantive statutes. For a description of the Israeli statute, see Amichai Magen & Peretz Segal, “Israel,” in Hensler, Hodges & Tulibacka, 2009, *supra* note 15.

⁶³ But California does not have the highest per capita rate of ordinary civil litigation; a dozen states’ rates of ordinary civil litigation are higher than the Israeli rate of class action filings. National Center for State Courts, COURT STATISTICS PROJECT, 2012 Trial Court Civil Caseload, available at http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro.

⁶⁴ Vince Morabito, AN EMPIRICAL STUDY OF AUSTRALIA’S CLASS ACTION REGIMES, THIRD REPORT, Australian Research Council, November 2014, ssrn-id2523275, at 2. In Australia as in the United States, a single event or alleged legal violation may result in multiple duplicative class action filings, which are usually consolidated by the court. Morabito reports that about 50 percent of Australian federal class actions were associated with other class action filings. These 165 lawsuits were a result of 52 disputes. *Id.* at 3. Because Morabito reports most of his data on a filing basis, rather than on a dispute basis, I have used the total filing numbers in this essay.

⁶⁵ Vince Morabito, Australian Research Counsel, AN EMPIRICAL STUDY OF AUSTRALIA’S CLASS ACTION REGIMES: LITIGATION FUNDERS, COMPETING CLASS ACTIONS, OPT OUT RATES, Victorian Class Actions and Class Representatives 16 (2010), available at <http://globalclassactions.stanford.edu/sites/default/files/documents/Vince%20Morabito%20nd%20Report.pdf>. Morabito’s more recent 2014 report does not report the ratio of class action filings to total civil filings.

Israel's annual class action filings have increased dramatically, from 28 in 2007 to 820 in 2012, the last year for which data are available. In all, a total of 2004 class action lawsuits were filed over this period. Filings in each year have increased substantially, relative to the preceding year, suggesting that the latest number is a better indicator of present use of the class action process than an average computed over several years.⁶⁶

There is no comprehensive database of U.S. class action complaints. Using a variety of incomplete data sources for the mid-2000s, Hensler estimated that there were approximately 6500 class action complaints filed in U.S. state and federal courts in 2005, about one percent of all civil case filings.⁶⁷

Table 2 assembles these data, along with the total population and GDP of each country. These three jurisdictions share features that we would expect to facilitate class actions, including broad scope, less restrictive standing rules, availability of money damages and opt-out provisions. The (estimated) per capita rate of annual class action filings in all three jurisdictions is very small, with Israel, perhaps surprisingly, in the lead.

Table 2
Number of Annual Class Action Filings, with Population and GDP

| COUNTRY | # of Class Action Filings (Year) | Population | Per Cap* | GDP |
|---------------------------------|----------------------------------|------------|----------|-------------|
| Australia ⁶⁸ | 19 (2013) | 23 M | <.00 | 1 T (USD) |
| Israel ⁶⁹ | 820 (2012) | 7 M | .53 | 209 B (USD) |
| United States ⁷⁰ | 6500 (2005) | 298 M | .02 | 12 T (USD) |
| *Per capita estimates are mine. | | | | |

2. *Composition of the Class Action Caseload*

Since citizens may bring class actions to challenge government policy as well as to seek redress from private economic actors, to understand what role class action litigation might be playing in regulating the economy we need to disaggregate the numbers. Disaggregated court statistics are in even shorter supply than total filing data. Morabito devised a coding scheme to distinguish the class action filings in his comprehensive Australian database by type of claim.

⁶⁶ Alon Klement, Keren Weinshall, Yifat Treblus & Roni Avissar-Sade, CLASS ACTIONS IN ISRAEL – AN EMPIRICAL PERSPECTIVE, 2014, available at <http://elyon1.court.gov.il/heb/Research%20Division/doc%5C25122014.pdf>.

⁶⁷ Deborah Hensler, "Using Class Actions to Enforce Consumer Protection Law," in Geraint Howells, Ian Ramsay & Thomas Wilhelmsson, eds. HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW (2010). Hensler's estimate is for non-duplicative filings.

⁶⁸ Morabito, 2014, *supra* note 64.

⁶⁹ Klement et al., 2014, *supra* note 66.

⁷⁰ Hensler, 2010, *supra* note 67.

Israel's statute specifies the types of claims that may be brought as class actions, which yields disaggregated information. Hensler et al., 2000, report disaggregated statistics from a data collection effort in 1995-1996 that relied on a combination of reported judicial decisions and a content analysis of mass media. Table 3 assembles these data. Because the distribution of Australian class actions filings by case type differed substantially between the earlier and later periods and because neither of these periods is identical to the period for which there are Israeli and U.S. data, Table 3 reports Australian data from 1992-2003 and from 2003-2014 separately.⁷¹

⁷¹ The court reporting years in Australia begin and end in March. The data shown in Table 3 are for non-overlapping periods.

Table 3
Composition of Class Action Caseload in Australia and the United States

| TYPE OF CLAIM | AUSTRALIA | | ISRAEL | UNITED STATES |
|---|----------------|----------------|----------------------|----------------------|
| | Morabito, 2014 | Morabito, 2014 | Klemont et al., 2014 | Hensler et al., 2000 |
| Time Period | 1992-2003 | 2003-2014 | 2006-2012 | 1995-1996 |
| | % | % | % | % |
| Securities, investment & other non-consumer financial ⁷³ | 17 | 30 | 2 | 19 |
| Consumer | 6 | 13 | 77 | 25 |
| Anti-trust | < 1 | 2 | 1 | (Not reported) |
| Product. Liability/ Mass Torts | 26 | 8 | Na | 9 |
| Employment | 27 | 7 | 3 | 15 |
| Civil Rights ⁷⁴ | < 1 | 3 | 1 | 14 |
| (Other) Claims Against Government | 18 | 1 | 14 | 11 |
| Other | 6 | 11 | 2 | 7 |
| TOTAL | 100 | 100 | 100 | 100 |
| | | | | |

In all three jurisdictions, class actions pertaining to economic behavior predominate. Securities class actions and other investment class actions constituted almost 20 percent of the cases in the early period in Australia and in the U.S. around the same time period, increasing to a full 30 percent in Australia in the later period. Morabito attributes the shift in distribution in the Australian filings towards securities and investment cases in the last decade to the rise of third-party litigation financing.⁷⁵ By contrast, there have been few securities class actions in Israel. The larger fractions of consumer protection cases in Israel and the United States, relative to Australia, may reflect differences in expectations of fee awards among the three countries.

⁷² See text and footnotes for details.

⁷³ The 48 securities class actions brought in Australia's federal courts from 1992-2014 included 9 brought by The Australian Securities and Investments Commission. See Welsh & Morabito, 2014, *supra*, note 25 at 48.

⁷⁴ The Israeli civil rights claims were brought against private parties; the U.S. civil rights category includes both claims against private parties and claims against the government.

⁷⁵ Morabito, 2014, *supra*, note 64 at 10.

Judges award fees in civil litigation in Israel, taking into account both actual expenditures and results achieved.⁷⁶ In the United States, judges award fees in class actions (although not in ordinary civil litigation), taking similar factors into account. Australian lawyers are permitted to charge “no win, no lose” fees, but cannot charge fees based on damages obtained for their clients. The legislated fee regime has been modified by the introduction of third-party litigation financing but, as noted by Morabito, the financiers prefer to invest in higher value securities and investment lawsuits. One reason for the relative disinclination for third-party financiers to invest in consumer class actions is that the large number and wide dispersion of potential class members make it difficult to create “closed” classes of individuals who have each contracted with the financier to fund the action, in exchange for a share of their individual winnings.⁷⁷

Is there an optimal number of regulatory enforcement class action filings, relative to population size or economic productivity, that we might use as a benchmark for evaluating the frequency and distribution of regulatory class actions in Australia, Israel, the United States or other jurisdictions? Without information on the frequency of violations of different types of economic regulations, the absolute numbers of cases do not allow us to assess whether there is too much class action litigation, too little or just the right amount, either generally or in specific substantive domains. This “missing denominator” problem bedevils all efforts to evaluate the frequency of civil lawsuits, both individual and collective,⁷⁸ and contradicts the rhetoric of hyper-litigation promoted by corporate lobbyists.

B. The Question of Merit

In assessing the value of private class actions for enforcing economic regulations, we need to know both the rate of “false negatives” – violations that were justiciable but did not lead to litigation – and “false positives” – litigations that had no basis in law or facts. Because no one knows the number of violations of economic regulations that go unchallenged by litigation, there is no way to calculate false negatives associated with different legal regimes. But a primary criticism of private regulatory enforcement class actions is that a substantial fraction – perhaps even the overwhelming majority – are frivolous or spurious – i.e. “false positives.” How to define frivolous litigation is a vexed question: one person’s frivolous claim is often another’s legitimate pursuit of a legal right to a remedy. Trial verdicts arguably provide a measure of merit,⁷⁹ but in many jurisdictions a majority of claims never reach trial.⁸⁰ In common law jurisdictions, however, a significant fraction of civil lawsuits are resolved before trial, by judicial

⁷⁶ Theodore Eisenberg, Talia Fisher, & Issi Roen-Zvi, “Attorneys’ Fees in a Loser-Pays System,” 162 U. Penn. L. Rev. 1619 (2014).

⁷⁷ Email communication with John Walker, co-founder and executive director of Bentham/IMF Australia.

⁷⁸ Connor, *supra*, note 32 makes the same point regarding analyzing the effectiveness of public enforcement of anti-competition law.

⁷⁹ Even trial verdicts are not perfect measures of merit, as reflected in legal rules that permit (sometimes multiple) appeals.

⁸⁰ In the United States only a tiny fraction of civil lawsuits are tried to verdict. See Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,” 1 J. Empir. Leg. St. 459 (2004)

decisions. In the absence of other information about a claim, how a case was disposed pre-trial may provide a measure of merit.

In U.S. law, a dismissal on substantive grounds⁸¹ should be granted when there is no plausible set of facts that would support the plaintiff's legal claim (and therefore further litigation, including discovery, is not worthwhile). A summary judgment is a judicial holding that there is no material dispute over the facts (and therefore no need for a full-blown trial) and that the movant wins as a matter of law.⁸² Summary judgment motions may be brought by any party, usually after discovery has taken place, but have become a favored tool of defendants. Rates of dismissals and summary judgment may therefore be treated as indicators that a claim lacked merit, at least in the view of the court. In contrast, a settlement – negotiated at their discretion by plaintiffs and defendants – may be treated as an indicator that the claim was meritorious enough that a defendant was unwilling to try its luck at trial. Using dismissal, summary judgment and settlement rates as proxies for merit is contestable: in the United States, both legal scholars and practitioners have fiercely criticized the U.S. Supreme Court's articulation of the legal standards for dismissal and summary judgment,⁸³ and many U.S. defendants – particularly class action defendants – claim that they are “blackmailed” into settling non-meritorious cases because of the risks associated with going to trial.⁸⁴

Finally, in U.S. federal and state courts a large fraction of ordinary civil suits are “voluntarily dismissed,” meaning that the plaintiffs dropped their claims. In some instances, this indicates that the parties agreed to settle out of court without any judicial intervention; in other instances the plaintiff simply decided not to go forward, which could reflect a reassessment of the value of their legal claim or a lack of resources. Court records never distinguish between these outcomes.

Data on how ordinary civil lawsuits are disposed are patchy in all jurisdictions. The United States and Australia are the only two jurisdictions for which there are publicly available data on the patterns of disposition in class actions. As discussed in more detail *infra*, the

⁸¹ In the United States, a case may be dismissed “without prejudice,” which means that the plaintiff may amend and resubmit the complaint. In some complex litigations, the initial complaint is amended multiple times as the litigation progresses. In some instances, a claim is dismissed because the court does not have jurisdiction, the plaintiff fails to prosecute the case in a timely manner or for some other technical matter. Unless reversed on appeal, these dismissals generally terminate the claim, at least in the court that dismissed it.

⁸² For a discussion of the evolution of doctrine on motions to dismiss and summary judgment, see Suja Thomas, “The New Summary Judgment Motion: The Motion to Dismiss Under *Iqbal* and *Twombly*,” 14 *Lewis & Clark L. Rev.* 15 (2010).

⁸³ *Id.*

⁸⁴ On claims of “blackmail settlements” and lack of evidence to support these claims, see Hensler, 2013, *supra* note 13. An added problem is that there is not universal agreement on how to calculate settlement rates from court data. Whether or not a non-adjudicatory disposition should be termed a settlement turns out to be a complicated conceptual as well as empirical problem. See Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?* 6 *J. Empir. Leg. Studies* 111 (2009).

distributions of class actions by disposition type are fairly similar for the two jurisdictions. A substantial fraction of class complaints are dropped or withdrawn by plaintiffs, and a substantial fraction are settled by negotiation between the class and defendants. When cases are not dropped or settled they are likely to be disposed of by pretrial judicial decisions in favor of defendants.⁸⁵ In Australia, but not the United States (at least recently), a small fraction of cases are disposed by trial or post-trial verdict in favor of class members.

The distribution of class actions by disposition type belie the frequent assertion in the United States (and in debates over adopting class action procedures elsewhere) that all class actions settle because it is too risky for defendants to pursue them (i.e. “blackmail settlements”). In fact, in the United States, in several of the samples for which disposition type data are available, most cases did not yield compensation or other relief for the class.⁸⁶ In the last decade, Australian class actions have been more likely to produce remedies for the class. In both jurisdictions, the available data suggest that class actions comprising higher value claims, which are more likely to be litigated by experienced and well-financed class counsel (e.g. securities class actions), are more likely to reach either a pretrial court judgment or a settlement than class actions that typically comprise smaller value claims. The latter are more likely to be dropped or to end with a settlement with an individual putative class representative, effectively ending any class action exposure for the defendant.⁸⁷

Multiple stories about the effectiveness of regulatory enforcement class actions might be told about these data. If many class complaints that do not yield remedies for the class are non-meritorious, then there is no offsetting benefit for the costs they impose on defendants, and ultimately on consumers as well. But if a significant fraction of these unsuccessful class complaints were abandoned by class counsel because of insufficient resources or because of legal standards that systematically advantage defendants to the detriment of plaintiffs, then

⁸⁵ In Australia, where there is no requirement for class certification, pretrial decisions favorable to defendants include withdrawal of class status from the litigation. This usually occurs in response to a defendant’s motion challenging the plaintiffs’ statutory right to proceed as a class.

⁸⁶ The fact that in the United States, the majority of putative class actions are not formerly certified as class actions *unless and until they are settled* is the likely source of the perception that “all class actions settle.” Recent U.S. Supreme Court decisions requiring extensive evidentiary hearings prior to class certification – arguably shifting battles from the summary judgment stage to the certification decision – may change this pattern.

⁸⁷ Fitzpatrick’s data, which are limited to class actions that settled, indicate that consumer class actions are more likely to be certified for settlement purposes only (so-called “settlement classes”) than class actions generally. Eight-five percent of consumer class actions that settled were certified for settlement purposes only, as compared to 68 percent in the total sample. Calculated by me from data presented in Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 7 *J. Empirical Legal St.* 811 (2010) at 818. Virtually all Israeli class action settlements (the majority of which relate to consumer protection) are approved by judges before certification. See Orna Rabinovich-Einy & Yair Sagy, “Courts As Organizations: The Drive for Efficiency and the Regulation of Class Actions,” 2015 (on file with author). Critics of U.S. settlement class actions argue that the fact that they are certified for settlement purposes only weakens class members’ position vis a vis defendants and leads to “sweetheart” settlements. See Hensler et al., *supra*, note 8, at 31-36.

society may be deprived of the potential benefits of a private regulatory enforcement regime. The available data do not allow us to choose between these stories – or indeed other stories.

1. *The United States*

There is no comprehensive database on class action dispositions in the United States,⁸⁸ but four studies of select types of class actions, using diverse data sources, report such distributional data. Table 4 presents these data. The first study, conducted by RAND, was a survey of state and federal consumer class actions against insurers, based on insurer records.⁸⁹ The second, conducted by the Federal Judicial Center, the research arm of the U.S. federal courts, was a study of diversity class actions filed in federal court, comprising contract and tort class actions, before the 2005 passage of the Class Action Fairness Act (CAFA).⁹⁰ The third study, conducted by the Meyer Brown law firm for the U.S. Chamber of Commerce using data from litigation reporters, dealt with federal employment and consumer class actions filed in 2009.⁹¹ The fourth study, conducted by Cornerstone Research using data compiled by the Stanford Securities Class Action Clearinghouse, pertains to federal securities class actions. This results of this study, presented in the final two panels of Table 4, permit us to distinguish the patterns of disposition by whether the class representative was an individual or institutional

⁸⁸ The burgeoning empirical scholarship on private class actions focuses almost exclusively on settled cases that resulted in published opinions, excluding any reference to other pre-trial dispositions. See, e.g., Samuel Estreicher & Kristina Vost, *Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment*, 6 *J. Empirical Legal Stud.* 768 (2009); Theodore Eisenberg & Geoffrey Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 *J. Empirical Legal St.* 248 (2010); Fitzpatrick, 2010, *supra* note 87; Donald Hawthorne, *Recent Trends in Federal Antitrust Class Action Cases, Developments: Antitrust* 58 (2010) reports the outcomes of only 19 disposed cases from a sample of 121 class actions filed between 2007 and 2009 at 61. Only 24 cases had reached the stage of motions to dismiss at the time of the analysis; of these, half were decided in favor of the plaintiff and half in favor of the defendant. *Id.*, at 60. Greg Wrobel, Michael Waters & Joshua Dunn, *Judicial Application of the Twombly/Iqbal Plausibility Standard in Antitrust Cases*, 26 *Antitrust* 8 (2011), reports that from 2007-201 appellate and district court judges granted 74 percent of motions to dismiss antitrust claims and denied 41 percent. As indicated by the fact that the numbers sum to more than 100, in a single ruling a judge may grant some claims and deny others; also, when judges grant motions to dismiss they may do so without prejudice allowing plaintiffs to re-file. Wrobel et al. do not distinguish between rulings that were dispositive and those that were not dispositive.

⁸⁹ Nicholas Pace et al., *INSURANCE CLASS ACTIONS IN THE UNITED STATES (2007), SUMMARY*, Table 5.1 at xxii. The data are from a non-random survey of mostly large property-casualty insurers. Two-thirds of the suits involved consumer complaints arising out of automobile insurance policies.

⁹⁰ Emery Lee & Thomas Willging, *IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: PRELIMINARY FINDINGS FROM PHASE TWO'S PRE-CAFA SAMPLE OF DIVERSITY CLASS ACTIONS*, Federal Judicial Center (2008). The data are a random sample of CAFA-eligible putative class actions filed in federal court and not remanded to state court, *prior* to the passage of CAFA, which expanded federal court jurisdiction for these sorts of class actions. Diversity cases would include consumer protection and employment class actions, inter alia, but would not include securities or anti-trust (cartel) class actions.

⁹¹ Mayer Brown LLP, *DO CLASS ACTIONS BENEFIT CLASS MEMBERS? AN EMPIRICAL ANALYSIS OF CLASS ACTIONS*, U.S. Chamber of Commerce Institute for Legal Reform (2013). The data were compiled from two commercial litigation reporters that follow class litigation. The final sample excluded a small number of state court class actions. The final sample of 169 cases included 14 percent of class actions still pending. *Id.*, *Fn* 81. The data I present exclude those cases.

investor.⁹² Only one of the four studies includes class actions filed in state courts, whose outcomes may differ significantly from federal class action outcomes. All of the data are from the 2000s, but the exact dates differ. This is an important caveat as U.S. class action jurisprudence has evolved dramatically over this time period.⁹³ All of these studies identified cases in which class action complaints were filed, typically termed “putative class actions.” Filing a class action complaint is the first step in the litigation process and does not assure that the lawsuit will ultimately be certified and resolved in class form.

Table 4
Distribution of U.S. Class Actions by Disposition Type, Selected Studies

| | Insurance Consumer Class Actions (State & Federal) | Contract and Tort Class Actions (Federal) | Consumer & Employment Class Actions (Federal) | Securities Class Actions With Institutional Investor Lead Plaintiffs (Federal) | Securities Class Actions Without Institutional Investor Lead Plaintiffs (Federal) |
|-----------------------------------|--|---|---|--|---|
| SOURCE ⁹⁴ | Pace et al., 2007 | Lee & Willging, 2008 | Mayer Brown, 2013 | Cornerstone, 2013 | Cornerstone, 2013 |
| STUDY PERIOD | 1993-2002 | 2003-2005 | 2009 | 1996-2010 | 1996-2010 |
| | % | % | % | % | % |
| DISPOSITION TYPE | | | | | |
| Voluntary dismissal ⁹⁵ | 47 | 55 | 35 | 2 | 9 |
| Dismissal or summary judgment | 37 | 29 | 31 | 43 | 41 |
| Class settlement | 12 | 13 | 33 | 55 | 50 |
| Trial | 1 | 0 | 0 | -- | -- |
| Other | 3 | 4 | 0 | -- | -- |
| SAMPLE SIZE ⁹⁶ | 564 | 161 | 145 | 767 | 1720 |

⁹² Cornerstone Research, SECURITIES CLASS ACTION FILINGS 2013 MID-YEAR ASSESSMENT (2013), Figures 15 & 16. Ten percent of the cases had reached summary judgment at the time of the analysis; I have included them in the pretrial adjudication category even though it is possible that some of these would have produced a ruling in favor of the plaintiff that would ultimately provoke settlement. The data are a subset of the total database compiled and maintained by the Stanford Securities Class Action Clearinghouse which includes 3641 federal securities class actions filed between January 1, 1996 and June 30, 2013. Dismissal rates vary over time. Over the period 1996-2006 for which all or virtually all cases have been resolved the highest dismissal rate was 48 percent and the lowest dismissal rate was 28 percent. The Clearinghouse does not report any settlements between individual plaintiffs and defendants; whether such outcomes do not occur or simply do not make their way into the database is unclear.

⁹³ Robert Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. (2013)

⁹⁴ See text and footnotes for details.

⁹⁵ Because they relied on insurer records rather than court records, the RAND researchers were able to distinguish cases that were resolved by individual settlements with putative class representatives and other voluntary dismissals. About 20 percent of the insurance consumer class actions were resolved by individual settlements.

⁹⁶ Sample sizes for all studies removed duplicative filings that are common in U.S. class action litigation.

Table 4 discloses sharp differences in the rates of different types of disposition of U.S. regulatory enforcement class actions across case types. The samples in which small value claims most likely predominated had higher rates of voluntary dismissals without a judicial disposition than the securities class action samples, which typically would involve larger value claims. There are different possible interpretations of this pattern. Perhaps the types of law firms that bring small value claim class actions are poorer judges of the legal and factual strength of claims than the more specialized law firms that bring securities class actions, leading to higher rates of voluntary dismissal among the former, compared to the latter. Perhaps the firms that prosecute smaller value claims give up more easily than securities class action firms because they have less financial wherewithal to persevere against deep pocket corporate defendants. Or perhaps firms that prosecute small value claim class actions have a scatter-shot business strategy of filing many class suits in the hope that a few will succeed.

Voluntary dismissals do not indicate how judges assessed the merit of class action complaints (although they likely reflect the parties' expectations of judicial assessments). Table 4 shows that pretrial judicial disposition rates varied from about 30 percent for the samples in which small value claims likely predominated to around 40 percent for the larger value securities class actions. Putting aside voluntary dismissals, the federal consumer and employment class actions filed in 2009 and the securities class actions were about as likely to be resolved by a pretrial judicial disposition as to be resolved by settlement. It is tempting to conclude that at least in these samples there were equal fractions of non-meritorious and meritorious claims. If so, then the insurance class action sample (which included state court class actions) and the pre-CAFA sample of federal contract and tort class actions might be viewed as including a higher proportion of non-meritorious claims.

2. *Australia*

Morabito, 2014 reports the distribution of class actions in Australia by disposition type for 1992 -2003 and for 2003-2014 (see Table 5)⁹⁷. There was a lower rate of voluntary dismissals (withdrawals by plaintiffs) and higher rates of both pre-trial adjudications in favor of defendants and settlements in the later period, compared to the earlier period. Recall that there was a shift in the composition of the class action caseload between these two periods: in the later period, the caseload included a larger fraction of security, investment and other larger value financial claims, compared to the earlier period (see Table 3). The shift in the distribution of disposition types may reflect this change in caseload composition: as we saw in the U.S. data (see Table 4), voluntary dismissals occur less frequently in class actions with higher value claims.

⁹⁷ Morabito, 2014, *supra*, note 64. The court reporting years in Australia begin and end in March. The data shown in Table 5 are for non-overlapping periods. I have collapsed the categories in Morabito's report to facilitate comparisons with U.S. data.

Table 5
Distribution of Australian Federal Class Actions by Disposition Type,
1992-2003 & 2003-2014⁹⁸

| | 1992-2003 | 2003-2014 |
|---|-----------|-----------|
| | % | % |
| DISPOSITION TYPE | | |
| Voluntary Dismissal (proceeding discontinued by class representative or discontinued as a class action) | 23 | 16 |
| Discontinued as a class action by the court | 9 | 8 |
| Pre-trial adjudication for Defendant (Application summarily dismissed) | 9 | 14 |
| Class Settlement | 40 | 56 |
| Judicial Decision Favoring Class at Trial or Post-Trial | 8 | 4 |
| Other | 11 | 2 |
| TOTAL NUMBER OF CASES | | |

Previous analyses by Morabito also found differences in the distribution of dispositions type by court district (region), and by the law firm that represented the class.⁹⁹ The settlement rate for class actions represented by Australia's two leading plaintiff class action firms (68 percent) was more than twice the rate for all other class actions (26 percent). None of the leading firms' cases were dismissed by the court, compared to almost a third of all other cases.¹⁰⁰ These differences in rates of settlement and pretrial dismissals may reflect both differences in expertise with regard to claims assessment and availability of adequate resources to vigorously prosecute class actions.

⁹⁸ Morabito, 2014, *supra*, note 64. The court reporting years in Australia begin and end in March. The data shown in Table 5 are for non-overlapping periods.

⁹⁹ Vince Morabito, AN EMPIRICAL STUDY OF AUSTRALIA'S CLASS ACTION REGIMES: FIRST REPORT: CLASS ACTIONS FACTS AND FIGURES (2009) available at http://globalclassactions.stanford.edu/sites/default/files/documents/Australia_Empirical_Morabito_2009_Dec.pdf

¹⁰⁰ *Id.* at 34-35.

C. Outcomes

To evaluate the deterrence potential of regulatory enforcement class actions, we need to know not only the rate of claiming, relative to violations, and the proportions of false negatives and false positives; we need also to know the direct and indirect costs class actions impose on defendants. Direct costs include payments to class members when the class prevails at trial and when defendants negotiate settlements, plus defendants' legal expenses for *all* cases, including those in which they prevail and those in which they negotiate settlements or lose at trial. (In loser-pay regimes, we need to take fee-shifts into account when calculating defendants' legal expenses.) Direct costs also include the expense of class action notices (required for opt-out class actions) and the costs of distributing settlement funds, elements that are usually included in the aggregate settlement value approved by U.S. judges. In addition, some class action settlements include injunctive relief, changes in policies and practices that also impose costs on defendants, and in the United States, some settlements include *cy pres* remedies – for example, contributions to consumer education or automotive safety programs. (Sometimes *cy pres* remedies are paid in lieu of cash payments to class members, either because it would be too expensive to try to locate all class members or because some class members do not claim amounts owed them. In the latter case the *cy pres* amount may equal the residual left in the fund.¹⁰¹) Indirect costs include reputational losses, which may affect market share, and effects on capital markets, which often respond dramatically to litigation events.

Given concern about the costs of litigation in all jurisdictions that adopt or consider adopting class action procedures, it is remarkable how little data there are on aggregate costs to defendants. Because in many modern legal regimes most lawsuits settle, and most jurisdictions regard settlements as a private matter between plaintiffs and defendants, it is usually difficult to obtain data on the outcomes of civil lawsuits. Class actions are an exception to this observation: because most jurisdictions that have adopted class actions require judges to approve settlements between the class and defendants after a public hearing, settlement provisions usually are a matter of public record. As a result of recent empirical scholarship in the United States relying on these public records, we know something about the distribution of aggregate settlement value in U.S. class actions, by type of case. Because under U.S. class actions rules, judges award attorney fees, we also know the relationship between the amount of fees awarded by U.S. judges and aggregate settlement value. But how much defendants pay to settle class action lawsuits often depends on the amount of individual remedies and the design of the settlement, which determines the number of class members who ultimately collect what defendants have committed

¹⁰¹ Because *cy pres* remedies do not directly benefit class members and may have a tenuous relationship to the subject of the class action they are a subject of controversy. *Marek v. Lane*, 134 S. Ct. 8 (2013) (Statement by C.J. Roberts concurring with decision to deny certiorari but suggesting the U.S. Supreme Court should take up the legality of *cy pres* remedies in class actions in a future case). However, from an enforcement perspective, *cy pres* remedies assure that the actual deterrence value of the lawsuit equals the intended value.

to pay. These data are rarely made public,¹⁰² although anecdotal data indicate that in some class actions very few class members come forward to collect their share of the settlement.

As a result, what we know about what the costs class actions impose on defendants is woefully incomplete. The available data indicate that the aggregate values of judicially-approved settlements vary substantially across different categories of claims (e.g. securities fraud versus labor wage-and-hours), from just a few million dollars, to hundreds of millions or more. The billion dollar settlements that make the news are rare. Generally, the attorneys collect about 25 percent of class action settlements in the United States, although the percentage awarded declines as the settlement amount increases.¹⁰³ For very large classes, estimated individual remedies are relatively modest, suggesting that defendants set a cap on the total amount they are willing to pay to settle a class action and are not willing to increase it proportionately with the size of the class. Nonetheless, there are class actions where the estimated average individual remedy amounts to thousands or even tens of thousands of dollars.

As we would expect, the available information on take-up rates indicates that when proffered individual remedies are very small, so too is the fraction of class members who come forward to claim it. When settlements include provisions to automatically pay out remedies to eligible class members – for example, by crediting continuing customers’ accounts – the aggregate payout by defendants will equal the aggregate amount approved by the judge. When unclaimed settlement amounts are distributed *pro rata* to class members who did claim or paid out in the form of *cy pres* remedies, defendants will also pay the formally-approved amount. But absent such provisions the defendants may well pay far less than the amount the judge approved. Some settlements include injunctive relief as well as money damages, and some judges take injunctive relief into account when awarding attorney fees, but we lack systematic data on the proportion of cases that produce injunctive remedies and their value. In sum, we know that in some class actions, defendants pay far less than the “advertised” settlement amount, but we do not have enough information to calculate the real expected value of class actions generally, or of specific types of class actions.¹⁰⁴

Finally, we know virtually nothing about what defendants pay their own counsel to contest and resolve class action litigation.

1. Approved Settlement Amounts

Using unpublished as well as published federal court opinions from 2005 and 2006 and other sources, Fitzpatrick has assembled the most comprehensive database of federal class action

¹⁰² See, e.g., See Nicholas Pace & William Rubenstein, HOW TRANSPARENT ARE CLASS ACTION OUTCOMES? EMPIRICAL RESEARCH ON THE AVAILABILITY OF CLASS ACTION CLAIMS DATA, Rand Working Paper, July 2008 at 23.

¹⁰³ Eisenberg & Miller, 2010, *supra* note 88.

¹⁰⁴ Estimated these values is critical for third-party litigation financiers, but the data they collect and the models they used to compute these estimates are proprietary.

settlements to date, 564 in all.¹⁰⁵ The typical aggregate value of these federal class settlements, including attorney fee awards, was quite modest (a median of \$5 million and a mean of \$55 million over the two-year study period). Most settlements (89 percent) offered class members cash, sometimes along with other remedies; about one-quarter included declaratory or injunctive relief. Mean settlement values varied substantially across case types.¹⁰⁶ Commercial, securities and anti-trust class actions produced the highest values, with means of \$112 million, \$96 million and \$60 million respectively.¹⁰⁷ Other types of class actions yielded more modest settlement amounts. Consumer and employment benefit class action settlements averaged \$19 million and \$14 million respectively. Labor and employment (wage and hour) and civil rights class actions both averaged about \$9 million.

Attorney fee awards in these cases averaged about 25 percent of aggregate settlement amounts. These percentages did not vary substantially across case types. However, the percentage fee award was inversely correlated with the settlement value, dropping below 25 percent for settlements valued above \$10 million. For settlements of \$72.5 million or more, the average was 18 percent. For settlements of one billion or more (9 cases), the average attorney fee awards was 13.7 percent of the total settlement value.¹⁰⁸

Data from small non-random samples of U.S. class actions also show variation in the aggregate value of class actions settlements by type of case. In their study of state and federal consumer class actions against insurers, Pace et al., obtained aggregate settlement amounts for 36 cases. The median aggregate settlement amount (including attorney fees) was \$2.6 million and the mean was \$12.8 million, in line with the smaller value federal class action settlements reported by Fitzpatrick.¹⁰⁹ In their sample of 10 class actions, Hensler et al. found total settlement values ranging from \$1.5 million (in a consumer dispute over cable fee charges) to \$1 billion (in a property damage class action arising out of defective polybutylene pipes). The smallest approved settlement amount for a consumer class action was the \$1.5 million in the cable fee litigation; the largest was \$75.5 million (in a dispute over deceptive labeling of contact lenses). The mass tort class action settlements ranged in value from about \$52 million (for a toxic exposure case) to \$1 billion for the polybutylene property damage case.¹¹⁰ The only published data on the outcomes of Australian class actions is for 10 cases funded by third-party

¹⁰⁵ Fitzpatrick, 2010, *supra* note 87.

¹⁰⁶ Fitzpatrick reports settlement values *including* attorney fee awards – that is, the total the defendant offered to pay to settle the class action.

¹⁰⁷ Robert Lande and Joshua Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F.L.Rev. 879 (2008), report higher medians and means for antitrust settlements. *Id.*, Table 1 at 892. However their sample excluded settlements of less than \$50 million.

¹⁰⁸ Although Fitzpatrick's method had a higher likelihood of including all federal class action settlements during the study period, his findings generally track Eisenberg & Miller, 2010, *supra*, note 88.

¹⁰⁹ The researchers note that these relatively high median and mean estimates reflect a small number of settlements with less than 1000 class members. *Id.* at 53.

¹¹⁰ Hensler et al., *supra* note 8, Appendix at 533-592.

litigation financiers. The average total settlement value of these class actions was \$31 million, and the median was \$8 million.¹¹¹

2. *Amounts paid to class members*

Mayer Brown collected actual outcome data on 40 federal consumer class actions resolved in 2009.¹¹² Almost half of the settlements (18) were so-called “claims made” settlements meaning amounts not claimed by eligible class members were not paid by the defendants. The researchers could only obtain data on the claims rates for these settlements in six of the cases. In one of these six – an ERISA class action arising out of the Bernard Madoff Ponzi scheme—claimants stood to collect large sums; not surprisingly, virtually all of the class members submitted claims. In three of the remaining cases, one percent or fewer class members claimed compensation; in two, the claiming rate was about ten percent.¹¹³ Thirteen of the 40 settlements provided for automatic distribution of compensation to class members. Such automatic distribution is feasible when the defendant can easily identify class members, such as employees, insurance or telecommunications subscribers, or others with whom defendants have contractual relationships. In two of the three automatic distribution settlements that Mayer Brown identified as consumer class actions, class members received modest to substantial cash payments; in a third they received non-cash benefits of uncertain value.¹¹⁴ The remaining nine class actions settled for injunctive relief or cy pres remedies. Although Mayer Brown derides the value of the injunctive relief they describe,¹¹⁵ others might disagree with their assessment.

In their study of consumer class actions against insurers, Pace et al. were able to determine distribution rates (including cash payments and credits to subscribers’ accounts) for 43 percent of the settlements they identified (29 cases in all). The median distribution rate was 15 percent, but because a few settlements had much higher take-up rates, the mean distribution rate was 45 percent. The median total payout (i.e. to all class members) was \$500,000, but in 10 percent of the settlements the total payout was \$25,000 or less.¹¹⁶

Hensler et al. attempted to collect actual outcome information for the 10 U.S. class actions they studied intensively but were unable to obtain it from any source in one of those

¹¹¹ Vince Morabito, AN EMPIRICAL STUDY OF AUSTRALIA’S CLASS ACTION REGIMES: SECOND REPORT (2010), available at <http://globalclassactions.stanford.edu/sites/default/files/documents/Vince%20Morabito%202nd%20Report.pdf>

¹¹² Mayer Brown, 2013, *supra* note 91 at 7. For the distribution of this sample by disposition type, see Table 4, *supra*.

¹¹³ Mayer Brown does not describe the substantive claims that gave rise to these class actions, nor the aggregate dollar value of the settlements approved by the court.

¹¹⁴ *Id.* at 12.

¹¹⁵ Mayer Brown describes the nature of the injunctive relief for only 4 of the 9 cases they identify with such relief. *Id.* at 13-14.

¹¹⁶ Pace et al., *supra*, note 89 at 55. The median total payout was calculated for 39 cases or 57 percent of the settled cases.

cases.¹¹⁷ In 6 of the remaining 9 cases, they found that class members had collected (or would likely collect) all or most of the settlement monies set aside for them. In the remaining 3 cases they estimated that class members collected only about 30 percent of the total funds. In one of those 3 cases, the amount not claimed by class members was paid by the defendant in the form of a *cypres* award. As a consequence, defendants paid the full amount of the settlement approved by the court in 7 of the 9 cases. In one of the two remaining cases, Hensler et al., estimate that the defendant paid approximately 60 percent of the approved settlement value; in the other the defendant paid 23 percent.¹¹⁸

Four of the six class action settlements for which Pace & Rubenstein were able to find information¹¹⁹ provided for automatic payment to class members. In one of the two remaining cases, twenty percent of class members completed the required claiming procedure; in the other four percent of class members claimed. However, in one of these cases, the settlement specified that unclaimed funds would be distributed to claimants on a pro rata basis, so the defendant ultimately paid the full negotiated amount; in the other, the defendant apparently paid a small fraction of the judicially approved value.¹²⁰

3. *Injunctive relief*

Empirical analysts generally have not attempted to place a dollar value on the declaratory and injunctive relief included in some U.S. class action settlements, although some judges accede to class counsels' urging them to do so in awarding attorney fees.¹²¹ Many empiricists ignore declaratory and injunctive remedies altogether.¹²² To date, there has been no systematic effort to analyze declaratory and injunctive remedies in private class actions.¹²³ However, descriptions of

¹¹⁷ The settlement approved by the judge in that case contained no information about total settlement value. The researchers were able to estimate how much money was ultimately collected by the class from other sources but it was impossible to compare this to the amount class counsel and defendants agreed to, and the latter declined to share that information with the researchers.

¹¹⁸ Hensler et al. *supra*, note 8, Figure 15.1 at 425, Table 15.8 at 436 and Appendix material.

¹¹⁹ Pace & Rubenstein, 2008, *supra*, note 102.

¹²⁰ *Id.*, at 24.

¹²¹ Fitzpatrick, 2010, *supra*, note 87, reports finding only a few instances of judges taking injunctive relief into account in calculating attorney fees. In their earlier study, Hensler et al., 2000, *supra*, note 8, describe instances of such awards.

¹²² This inattention to declaratory and injunctive remedies contrasts sharply with the focus of previous scholars who viewed class actions as vehicles for social reform. See, e.g. Abram Chayes, "The Role of the Judge in Public Law Litigation," 89 *Harv. L. Rev.* 1281 (1976); Martha Davis, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT* (1993); Owen Fiss, "The History of an Idea," 78 *Fordham L. Rev.* 1273 (2009-2010). The contemporary disinterest in declaratory and injunctive remedies likely is a function of the empiricists' discipline: most are economists or lawyers trained in law and economics who are unfamiliar with the qualitative research approaches that are most appropriate for studying non-monetary remedies. The advent of electronic dockets and commercial databases that extract data from them makes this sort of analysis more feasible than it was previously.

¹²³ Professor Margo Schlanger is in the course of compiling a database to support such analysis for civil rights litigation. However, her first published article relying on this database addresses EEOC actions, not private class actions. See Margo Schlanger and Pauline Kim, "The Equal Employment Opportunity Commission and Structural

outcomes in a small number of non-randomly selected class actions suggest that some regulatory enforcement suits do result in changes in policies and practices. Examples of class actions that led to changes in employment or consumer-related practices include class actions brought by African-American employees against Texaco¹²⁴ and Coca-Cola,¹²⁵ and a class action brought by African-American customers against the Denny's restaurant chain.¹²⁶ Lande & Davis cite as significant non-monetary remedies included in a sample of 40 federal antitrust class action settlements, natural gas price reductions, elimination of restrictions on insurance policies, elimination of caps on salaries of college sports coaches, and changes in credit card transaction policies that allegedly resulted in large cost savings for retailers.¹²⁷ Five of the ten class actions that Hensler et al. studied intensively resulted in changes in consumer practices or product characteristics, although some of the changes occurred after the litigation began but before it was resolved. In two additional cases, changes occurred as a result of related parallel litigation. Examples of changes included revising late fee provisions and changing credit finance practices to comply with state law, changing product labeling and changing product design. Two cases led to changes in state law.¹²⁸ Mayer Brown report that settlements in nine of the forty consumer and employment class actions they studied intensively included injunctive relief. Although they

Reform of the American Workplace," University of Michigan Law School Public Law and Legal Theory Research Paper No. 340, August 2013.

¹²⁴ *Roberts v. Texaco, Inc.*, 1997 U.S. Dist. LEXIS 23848 (S.D.N.Y. Mar. 21, 1997). The employees charged Texaco with discrimination in promotion and pay policies. In the settlement approved by the court Texaco agreed to establish an independent task force to monitor anti-discrimination and diversity in employment practices and require diversity training, as well as to award a one-time 10% salary increase to current African-American employees, in addition to creating a \$115 million cash fund. See "Roberts v. Texaco," Bernstein, Litowitz, Berger & Grossman, LLP, available at <http://www.blbglaw.com/cases/00081>. See also Bari-Ellen Roberts and Jack White, ROBERTS VS. TEXACO: A TRUE STORY OF RACE AND CORPORATE AMERICA (1999).

¹²⁵ *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001) African-American employees charged Coca-Cola with discrimination in promotion and pay policies. In the settlement approved by the court Coca-Cola agreed to reform its employment policies with regard to minorities and to establish an independent panel to monitor its hiring and promotion practices, as well as to create a \$156 million fund to compensate employees who had been denied promotion. Media coverage highlighted Coke's agreement to accept whatever changes in employment policies regarding minorities that the panel might recommend. Greg Winter, "Coca-Cola Settles Racial Bias Suit," *New York Times*, November 17, 2000, available at <http://www.nytimes.com/2000/11/17/business/coca-cola-settles-racial-bias-case.html?pagewanted=all&src=pm>

¹²⁶ *Dyson v. Flagstar Corp.*, 1996 U.S. Dist. LEXIS 22685 (D. Md. July 17, 1996). African-American customers sued Denny's and its parent Flagstar Corporation for discriminatory practice that includes denials of service and derogatory remarks. In addition to establishing a \$54 million cash fund to compensate complaining customers, the defendant agreed to change its practices and to hire an outside civil rights lawyer to monitor its compliance with the agreed upon changes, in accordance with a consent decree negotiated by public and private lawyers. Steven Labaton, "Denny's Restaurants to Pay \$54 Million in Race Bias Suits," *New York Times*, May 25, 1994, available at <http://www.nytimes.com/1994/05/25/us/denny-s-restaurants-to-pay-54-million-in-race-bias-suits.html?pagewanted=all&src=pm>

¹²⁷ Lande & Davis, 2008, *supra*, note 107 at 901-902.

¹²⁸ Hensler et al., 2000, *supra*, note 8 at 431-33.

dismiss the value of the changes in marketing practices they describe,¹²⁹ others' assessments might differ.

4. *Payments to plaintiff class counsel*

Because in U.S. class actions fees are awarded by judges, rather than set by contracts between class representatives (or class members) and plaintiff class action attorneys, what defendants pay class counsel usually is a matter of public record in the United States. Although fee awards are determined according to different rules in different judicial circuits, in practice, judges award fees as a percentage of settlements, and fee awards are included in the aggregate settlement values reported in the studies cited above. Aggregate settlement values approved by judges also include the costs to distribute the settlement fund and the costs of notice, tasks that in the United States are sub-contracted by plaintiff class counsel to specialized claims administration firms.

5. *Payments to defense counsel*

As there is no legal requirement for defendants to publicize their own litigation expenses, we also have little systematic information about this component of their costs. Hensler et al. were able to obtain information about defendants' litigation costs in just 3 of the 10 class actions they studied intensively. The number varied dramatically, equaling class counsel fee awards in one case, about half of class counsel fees in another, and adding only a small percentage to total attorney costs in a third.¹³⁰

6. *Indirect Costs*

Defendants' indirect costs include effects on market share (for product and service providers and distributors) and effects on cost of capital. Calculating indirect costs is complicated so it is unsurprising that we have little systematic information about this component of defendants' costs.¹³¹

D. Relationship of Private Class Actions to Public Enforcement

Some class action critics argue that private class actions add little of value to public enforcement of market regulations. The critics argue that in many instances entrepreneurial class counsel bring actions where public regulators deemed or would deem no actionable violation took place, and in others – where public officials have undertaken regulatory activities – class counsel simply ride the coattails of public officials, driving up the costs of enforcement without

¹²⁹ Mayer Brown, 2013, *supra* note 91 at 13-14.

¹³⁰ Hensler et al., *supra* note 8, Figure 15.8 and discussion at 440-441.

¹³¹ For a review of the literature on indirect costs of mass tort litigation, which mostly proceeds in non-class aggregated form in the United States, see Deborah Hensler, "The Socio-Economics of Mass Torts: What We know, Don't Know and Need to Know," in Jennifer Arlen, ed., RESEARCH HANDBOOK ON THE ECONOMIC ANALYSIS OF TORT (2013).

achieving commensurate benefits.¹³² Some responsive regulation theorists see private litigation focused on blame and monetary remedies as counter to efforts by enlightened public regulators to persuade regulated entities to comply by invoking moral norms before moving up the regulatory “pyramid” to criminal and civil sanctions.¹³³

To understand the consequences of private class actions for public enforcement we need to know the prevalence of different combinations of public and private enforcement, whether and to what extent public officials, private class action attorneys, class representatives and civil society coordinate their activities and what outcomes are achieved by them working separately and together. Capturing quantitative relationships between private and public enforcement requires synthesizing databases from different institutions. Investigating whether and how private and public actors work together requires qualitative research. Both are difficult to accomplish. However, the available data present a more complex picture of the relationship between private class actions and public enforcement than the critique assumes. Most research on the relationship of private to public actions has found scant evidence of coattail riding by private lawyers on public enforcement actions. However, this research leaves open the question of whether private actions with no public involvement are meritorious or non-meritorious. When public and private actions occur in parallel, they produce different but arguably complementary outcomes.

Studies of public and private enforcement in France, Germany and the United Kingdom conducted during the past decade have consistently found that only a small percentage of private cartel damage actions – none of which were collective cases -- were “follow-on” actions to public actions.¹³⁴ Most cartel cases involved corporate plaintiffs suing corporate defendants and a sizeable fraction of cases sought injunctive relief in addition to or instead of compensation. Private actions far outnumbered public actions in these countries suggesting that private enforcement in this domain is not dependent on the availability of a collective proceeding.

A few studies have examined the relationship between outcomes in private class actions and public enforcement actions. Welsh and Morabito compared private securities class actions to the Australian Securities and Investments Commission (ASIC) enforcement actions for 1992-2012.¹³⁵ They identified 48 securities class actions during the period, of which 9 were filed by ASIC on behalf of a class. In those 9 class actions, no private investor class actions were filed. The remaining 39 private class actions were divided roughly equally between suits where there

¹³² For discussion of arguments against private enforcement of market regulations focusing particularly on the insurance industry, see Pace et al., *supra* note 89 at 65 et. seq.

¹³³ Ayres & Braithwaite, 1992; Braithwaite, 2006, *supra* note 33.

¹³⁴ See, e.g., Sebastian Peyer, Germany – Comparative Private Enforcement & Consumer Redress in the EU, available at <http://www.clcpecreu.co.uk/pdf/final/Germany%20report.pdf>; Muriel Chagny & Jean-Louis Fourgoux, Competition law, private enforcement and collective redress in France, 3-4, available at <http://www.clcpecreu.co.uk/pdf/final/France%20report.pdf>.

¹³⁵ *Supra*, note 24 at 48, 52. I am grateful to Welsh and Morabito for providing details on ASIC action in successful and unsuccessful private class actions.

was also some ASIC activity (18) and suits in which there was no public action other than the private class action (21). Welsh & Morabito focused on the 18 instances of combined private and public action. In 5 of these 18, ASIC instigated criminal prosecutions, and in 6 of the 18 they instigated civil penalty proceedings. ASIC was equally likely to pursue criminal prosecution in the instances where private actions succeeded and in the instances where private actions failed, and slightly more likely to pursue criminal penalty proceedings in the instances where private actions succeeded than in instances where private actions failed. Although these samples are too small to be conclusive they suggest that private and public regulatory decisions and outcomes are shaped by different factors, and that objective merit is only one of those factors.

Lande & Davis report that 15 of the 40 private antitrust class actions that they studied (38 percent) arose before any investigation by the U.S. Department of Justice (DOJ). In some of these cases (all of which settled for at least \$50 million) public enforcement followed the initiation of a private class action, in others there was never any public action.¹³⁶ In other instances there was a combination of private and public action but it was impossible to determine which came first. As Lande & Davis write, “the relationship between DOJ enforcement and private class actions is symbiotic.”¹³⁷ In 13 of the 40 settled class actions, defendants were subject to criminal penalties and in 12 of the 40 cases defendants agreed to pay civil penalties.¹³⁸ The 40 settled class actions had a combined aggregate settlement value (including attorney fees and expenses) of about 22 billion in 2010 dollars. Arguing in favor of the deterrent value of private class actions, Lande & Davis compare this to 7.7 billion (2010 dollars) in criminal fines levied by the DOJ during the same period.¹³⁹

As part of their study of consumer class actions against insurance companies, Pace et al., surveyed state insurance regulators and asked them to rank the claims brought in those actions by degree of relationship to the regulators’ scope of authority. Using these rankings, the researchers report that the majority of the private suits overlapped with the public regulators’ scope of authority either substantially (22 percent) or moderately (59 percent).¹⁴⁰ Insurance company defendants argued that regulators had exclusive or primary jurisdiction in about 12 percent of the cases, but there was no difference in case outcomes (including pretrial dispositive outcomes for

¹³⁶ Robert Lande & Joshua Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of U.S. Anti-trust Laws*, 2011 B.Y.U.L. Rev. 315 (2011). Lande & Davis sampled federal antitrust class actions settled for amounts of \$50 million or more, between 1990 and 2007.

¹³⁷ Robert Lande & Joshua Davis, *The Extraordinary Deterrence of Private Antitrust Enforcement: A Reply to Werden, Hammond & Barnett*, available at <http://www.moginlaw.com/wp-content/uploads/2013/04/Comparative-Deterrence-from-Private-Enforcement.pdf>. In previous research I attempted to determine whether regulatory investigation or litigation shaped outcomes of product liability suits and eventually gave up. The timeline of public-recorded events did not suggest a causal order and informants advised me that even participants would have difficulty determining which events “caused” others.

¹³⁸ Lande & Davis, 2011, *supra* note 136 at 343.

¹³⁹ *Id.* at 338.

¹⁴⁰ *Id.* at 71.

the defense) for suits in which defendants used this argument and suits in which they did not.¹⁴¹ Notwithstanding the large percentage of claims that public regulators viewed as within their scope to regulate, public regulators intervened in only 8 percent of the 622 class actions for which the researchers were able to collect this information. When public regulators were active in the private enforcement litigation along with class counsel, class-wide settlements were more likely to occur than in all other cases.¹⁴²

In one of the six class consumer class actions Hensler et al. studied intensively, there was no regulatory investigation and in three others the relevant regulatory authority investigated and ruled there was no violation of the law. However, in one of the latter three cases, state attorneys general contravened the regulatory authority's decision, in another, the state Supreme Court did so and in the third the regulator called for a change in policy notwithstanding its initial ruling. In two of the four mass tort class actions Hensler et al. studied, regulators either stepped in or filed their own suits; in a third there was a reported regulatory investigation that did not produce a public outcome.¹⁴³ As reported *supra* these cases all involved substantial losses for class members; the disputes underlying the litigation related to causation and liability, not the injury facts. The case study data suggest a more complex pattern of public regulator-private relationships than observed in Pace et al.'s larger quantitative analysis.

IV. SHOULD PUBLIC POLICY MAKERS PERMIT PRIVATE CLASS ACTIONS FOR THE PURPOSE OF ENFORCING ECONOMIC REGULATIONS?

Faced with incomplete and inconsistent data on the effectiveness of private class actions for enforcing public regulations it is tempting to throw the private enforcement class action over the side of the metaphorical public policy boat. However, such a response ignores the general lack of systematic data (as compared to theory) on how well *public* enforcement regulates employer-worker relationships, consumer transactions, securities markets and cartel behavior. Just as corporate lobbyists delight in reporting anecdotal data on the failure of some class actions to accomplish much, worker representatives, consumer, investor and environmental advocates can point to spectacular failures of public enforcement: regulatory agencies captured by industry and crippled by legislatures' purposeful failure to properly fund them, individual regulators in thrall to the potential offered by revolving doors and sometimes suborned by monetary bribes and other gifts. Just as the formal and informal structural weaknesses of class action regime leave them open to subversion by entrepreneurial plaintiff lawyers, the formal and informal structural weakness of legislatures and regulatory agencies leave them open to subversion by well-capitalized corporate lobbyists. Recent examples of such failures include the British Petroleum deep water drilling catastrophe in the Mexican Gulf, the sub-prime loan crisis that led to the

¹⁴¹ *Id.* At 96.

¹⁴² *Id.* At 97.

¹⁴³Hensler et al., *supra*, note 8 at Table 15.4 & 421-424.

deepest global recession since the great depression of the 1930s, and the General Motors ignition switch defect that lead to fatal and injurious automobile accidents. In each of these instances corporate self-regulation failed as public regulators looked away, either knowingly or unknowingly.

Currently there are insufficient data to perform the comparative cost-benefit analysis of public and private enforcement that a rational public policy maker who was not beholden to any particular interest group would commission before deciding to discard one approach in favor of the other in some or all circumstances. The lack of data is startling given the huge sums of private money that have been devoted to lobbying against regulatory enforcement, both public and private and the increasing capacity of information technology to generate and analyze relevant data.

In the absence of better information, it makes more sense to build redundancy into systems for regulating economic behavior, than to choose one mode of enforcement over another. Just as airplane manufacturers incorporate multiple redundant systems into airplanes in order to maximize safety, public policymakers should incorporate redundancy into regulatory systems by creating and preserving opportunities for private actors to enforce regulations alongside of public enforcement.

A. Building a Knowledge Base for Enforcing Private (and Public) Regulation

To date, debate over the role of private enforcement of economic regulations via class actions has rested on theory, ideology, and political interest. Evidence that would permit us to assess widely-made assertions is scant and what evidence exists is ambiguous. If policymakers are to make evidence-based assessments of the relative contributions of private and public enforcement we need to develop objective data on who uses private class actions, for what purposes, and to what ends. In the recent past assembling these data was difficult: courts lacked the infrastructure to collate information on lawsuits and resources to develop such an infrastructure. However, in an era of “big data” the arguments that courts cannot publish such data are wearing thin. Modern legal systems are moving rapidly to require electronic filings and data entrepreneurs are becoming increasingly skillful in “scraping” data from public websites and creating detailed databases for analysis. Today, the challenge of building a knowledge base on private class actions is more a matter of will than resources.

The essential ingredients of a class action database are:

- Annual information on the number of putative class actions filed, by type of case (e.g. consumer protection, securities, anti-trust (cartel), mass accident), representative plaintiff (e.g. individual, financial institution, retail business, NGO, special purpose foundation), and type of defendant (e.g. insurer, petroleum company, pharmaceutical, etc.) This information can be obtained directly from

the complaint or, more efficiently, from a form filed by the counsel with the complaint.

- Information on the date and type of disposition for each complaint (e.g. withdrawn or voluntarily dismissed, dismissed on substantive grounds (e.g. lack of jurisdiction, failure to state a plausible claim), summary judgment, tried to verdict, settlement).
- For each settlement approved by the court, aggregate value, total number of class members who claimed, total amount ultimately delivered to class members, expenses to administer the settlement
- For jurisdictions that require judicial approval of attorney fees, total fees awarded to class counsel
- For jurisdictions that require cost-shifting, total cost-shift to prevailing defendants

B. In Praise of Redundancy

Redundancy is the key design principle of modern complex technical systems.¹⁴⁴ Understanding that individual elements of complex systems may fail in unanticipated ways, engineers have long adopted the principle that systems that contain redundant elements – “elements that work simultaneously but are capable of carrying the ‘load’ by themselves if required”¹⁴⁵ – are necessary to assure product safety. Early adherents of redundancy as a design principle focused on incorporating multiple identical elements into complex systems so that if and when one failed its twin (or triplet) could take over. However as redundancy moved outside laboratory settings, engineers learned that simple replication was not a panacea for defective parts. Multiple identical elements created a need for an overarching system to manage the elements and that managerial system might also fail. Moreover multiple identical elements, when operated in the same conditions, might fail together, with the result that the posited tiny likelihood of all of the identical elements failing at the same time underestimated failure risk. With more experience, redundancy design evolved. Today, optimal redundancy is understood to require multiple *independent* elements that are functionally dissimilar. Designed by different engineering teams, deploying different physical principles, these independent elements are more likely to be able to take over critical system tasks – i.e. fly the plane – when other elements fail. Moreover, by combining information from multiple elements the system is more likely to be able to take appropriate action in response to measurement challenges.¹⁴⁶

¹⁴⁴ John Downer, WHEN FAILURE IS AN OPTION: REDUNDANCY, RELIABILITY AND REGULATION IN COMPLEX TECHNICAL SYSTEMS, Centre for Analysis of Risk and Regulation, London School of Economics, Discussion Paper No. 53, May 2009 available at <http://eprints.lse.ac.uk/36537/1/Disspaper53.pdf>.

¹⁴⁵ *Id.* at 4.

¹⁴⁶ Much of what engineers now understand about redundancy design is derived from analysis of airplane crashes, space shuttle disasters and also computer programming errors. *Id.*

Modern regulatory regimes are complex technical systems. Like hardware and software, they have many moving parts. Like airplanes, spacecraft, and deep water drilling their safe and effective performance requires human action – and judgment – at critical stages. Like pilots, the public regulators are susceptible to distraction. Like aeronautical engineers, they are susceptible to “groupthink”. Like drilling engineers their incentives to assure safety may be offset by their need to meet tight deadlines under budget and performance pressure. Private class action litigation operates as an independent element of the regulatory regime in jurisdictions that have authorized them for enforcement as well as compensatory purposes. Like public enforcement it has a non-zero failure rate, and sometimes the failures are spectacular as when a class action settlement allows defendants to cap their liability exposure for a small amount in exchange for agreeing not to challenge an over-generous attorney fee request. Changes in private class action rules and practices could improve their ability to play a salutary enforcement role. To understand what reforms are merited we need more systematic information about class action uses and outcomes and a more honest appraisal of public as well as private regulatory failure.