THE CAMBRIDGE INTERNATIONAL HANDBOOK OF CLASS ACTIONS

Economic activity is more globally integrated than ever before, but so is the scope of corporate misconduct. As more and more people across the world are affected by such malfeasance, the differences in legal redress have become increasingly visible. This transparency has resulted in a growing convergence towards an American model of robust private enforcement of the law, including the class-action lawsuit. This handbook brings together scholars from nearly two dozen countries to describe and assess the class-action procedure (or its equivalent) in their respective countries and, where possible, to offer empirical data on these systems. At the same time, the work presents a variety of multidisciplinary perspectives on class actions, from economics to philosophy, making this handbook an essential resource to academics, lawyers, and policymakers alike.

Brian T. Fitzpatrick is the Milton R. Underwood Chair in Free Enterprise and Professor of Law at Vanderbilt Law School. His research focuses on class action litigation and federal courts. In 2010, he published what is still the most comprehensive empirical study of class action settlements in American federal courts. He is also the author of the provocative book, *The Conservative Case for Class Actions* (2019). Professor Fitzpatrick joined Vanderbilt's law faculty in 2007 after serving as the John M. Olin Fellow at New York University School of Law. He clerked for Judge Diarmuid O'Scannlain on the US Court of Appeals for the Ninth Circuit and Justice Antonin Scalia on the US Supreme Court. Professor Fitzpatrick practiced commercial and appellate litigation for several years at Sidley Austin in Washington, DC, and served as Special Counsel for Supreme Court Nominations to US Senator John Cornyn.

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The Cambridge Handbook of Class Actions

An International Survey

Edited by

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Foreword

The Global Expansion of Class Actions: Power, Politics and Procedural Evolution

Deborah R. Hensler

There's safety in numbers.[1]
Alone we can do so little, together we can do so much.[2]
El pueblo unido, jamas sera vencido.[3]
Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal re-dress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one.[4]

Across different time periods, cultures and social contexts, people have understood that collective action may succeed when individual action would fail. Yet legal dispute resolution is usually limited to individual action – one claimant seeking relief for harm attributed to one respondent, without regard to the interests or consequences for similarly situated individuals or society.[5] When a small number of individuals or entities have been permitted to proceed together it is usually because they have individual claims (or defenses) that are so closely related that it makes little sense to require them to proceed separately. In medieval England, as Yeazell has taught us, groups of people seeking remedies for common harm were permitted to bring actions for

[1] Harriet Harman, "Women Have Changed the Mood, Now We Need to Change Policy," *The Guardian*, February 21, 2018, analyzing the factors that produced the #metoo movement: "Third, the lesson is that there's safety in numbers. One woman on her own would just have been crushed by Weinstein's powerful legal and PR team and driven out of the industry. But no man can do that when there are a multitude of women's voices." www.theguardian.com/commentisfree/2018/feb/21/women-have-changed-the-mood-now-we-need-to-change-policy.

[2] Hellen Keller (attributed). Some interpret this statement as referring to communication; for others, it is a call to group action to achieve common goals. See e.g., Quote Investigator, April 21, 2014, at https://quoteinvestigator.com/2014/04/21/together/; Desert Health, July–August 2014, at https://deserthealthnews.com/stories/alone-can-little-together-can-much/.

[3] Sergio Ortega, "El Pueblo Unido," 1973, Union Songs, at https://unionsong.com/u443.html.

[4] Harry Kalven and Maurice Rosenfield, "The Contemporary Function of the Class Suit," 8 *U. Chic L Rev* 684, 686 (1941)

[5] See, e.g., Roscoe Pound, "Do We Need a Philosophy of Law?" 5 *Columbia L. Rev.* 339, 346(1905). ("Men have changed their views as to the relative importance of the individual and of society; but the common law has not . . . The common law . . . is concerned, not with social righteousness, but with individual rights. It tries questions of the highest social import as mere private controversies between John Doe and Richard Roe. And this compels a narrow and one-sided view . . . ")

damages as well as injunctive relief in courts of equity,[6] and at least since the twentieth century social associations – for example, consumer protection organizations – have been empowered in many civil law jurisdictions to bring legal actions on behalf of their members. However, group actions for collective harm had disappeared from the English courts by the mid-1800s and suits by associations, where permitted, have generally been restricted to declaratory and injunctive relief and provide nothing to group members in the way of restitution.[7]

Since 2000, this picture has changed dramatically: in civil law and common law jurisdictions in the Americas, Asia and Europe and in nations with diverse political systems and traditions, new procedures that allow large numbers of people and entities to band together to obtain remedies for harm, including under some circumstances compensation, have proliferated.[8] To date, at least thirty-five nations, including a majority of the world's most economically powerful nations, have established a modern form of group litigation – often termed a "class action," by reference to the US class action procedure.[9] How these procedures should be designed and in what circumstances they should be permitted have been sources of continuing controversy. The expansion of class actions since 2000 is a story of tension between a desire for an efficient mechanism for resolving mass claims and a fear of enabling collective action against powerful public and private institutions by less powerful members of society: workers, consumers, indigenous peoples, small businesses and others with little access to levers of political power.[10]

[6] Stephen Yeazell, *From Medieval Group Litigation to the Modern Class Action*, Yale University Press, 1987. Yeazell's narrative of the rise of class actions, focusing on the importance of groups, relationships within and between groups, group norms and group action in the medieval era replaced an earlier narrative that identified the English "bill of peace," an efficiency measure, as the source of the modern class action. See Deborah Hensler, "Of Groups, Class Actions and Social Change: Reflections on *From Medieval Group Litigation to the Modern Class Action*," *UCLA Law Rev in Discourse*, August 31, 2013, at www.uclalawreview.org/of-groups-class-actions-and-social-change-reflections-on-from-medieval-group-litigation-to-the-modern-class-action/.

[7] As Axel Halfmeier describes in this volume with regard to Germany, this older form of group action still plays an important private enforcement role in some jurisdictions. Yet, as the German experience shows, its potential power as a form of collective action is hobbled by the prohibition on obtaining damages and (recently) prohibitions on outside financing. *Id.*, "Collective Litigation in German Civil Procedure," this volume.

[8] Only a few jurisdictions adopted representative class action statutes before 2000. The United States adopted its modern class action rule in 1966. Australia adopted a federal class action statute in 1992. Quebec adopted a representative class action in 1978 and Ontario and British Colombia followed suit in the early 1990s. The Canadian federal class action statute was adopted in 2001.

[9] Deborah Hensler, "From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally," 65 *Kansas L Rev* 965, 966 (2017). In 2007, when Christopher Hodges and I organized the first global conference on class actions, we were able to identify only eighteen jurisdictions with a procedure resembling a representative class action. See Deborah Hensler, "The Globalization of Class Actions: An Overview," in Deborah Hensler, Christopher Hodges and Magdalena Tulibacka, *The Globalization of Class Actions*, 622 The Annals of the American Academy of Political and Social Science 7, 13 (March 2009).

[10] See, e.g., Report From the Commission to the European Parliament, The Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0040&from=EN:

> On the basis of a broader horizontal approach, the Commission adopted a Recommendation on 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law ('the Recommendation'). The Recommendation established principles which should be applicable in relation to violations of rights granted under Union law across all policy fields and in relation to both injunctive and compensatory relief. It follows from the Recommendation that all Member States should have collective redress systems at national level that follow the same basic principles throughout the Union, taking into account the legal traditions of the Member States *and safeguarding against potential abuse. At the same time, in view of the risks associated with collective*

Few jurisdictions have formally articulated an "access to justice norm" as the rationale for adopting a class action, Australia[11] and Canada[12] being the leading examples of jurisdictions that have done so.[13] Instead, many jurisdictions have labored hard to devise a procedural mechanism that while formally permitting a representative class action does everything possible to dissuade claimants from making use of the procedure. In Europe particular effort has been devoted to restricting the use of class actions for private enforcement by consistently referring to the new procedures, in formal law and informal practice, as "collective redress" mechanisms. Spurred by international lobbying efforts by the US Chamber of Commerce,[14] European policy-makers who have proposed adopting collective litigation procedures have whenever possible noted that their intent is to avoid "American style class actions."[15] In Europe and Asia, limiting the use of class actions may involve restricting funding for litigation as well as designing procedures that hinder

litigation, the principles set out by the Recommendation also aim to strike an appropriate balance between the goal of ensuring sufficient access to justice and also the need of preventing abuses through appropriate safeguards. Emphasis mine.)

[11] See, Edmund Fernandez, "Class Actions in Australia: A Quarter of a Century Later," GenRe, 2018, available at www.genre.com/knowledge/publications/cmint18-1-en.html ("In March 1992, Part IVA of the Federal Court of Australia Act 1976 (Cth) was enacted, enabling class actions to be pursued for the very first time. Access to justice and judicial economy were given as reasons when the bill was introduced in the Australian Parliament by the then Attorney-General.") See also Justice Bernard Murphy, "Access To Justice Under The Part IVa Regime," Keynote Address at seminar "Class Actions – Current Issues after 25 years of Part IVa," University of New South Wales (Australia), March 23, 2017, available at www.fedcourt.gov.au. Justice Murphy is a member of the federal bench of Australia.

[12] Borden Ladner Gervais, "Class and Collective Actions in Canada," Lexology, March 1, 2019, available at www.lexology.com/library/detail.aspx?g=df53fca8-7604-4ecb-91b6-bf039a0159fb. See also Jasminka Kalajdzic, *Class Actions In Canada: The Promise And Reality Of Access To Justice*, UBC Press, 2018.

[13] Members of the US federal judiciary advisory committee that drafted the 1966 version of Rule 23 have written that committee members sought to facilitate civil rights litigation of the sort exemplified by *Brown* v. *Board of Education* (347 U.S. 483 (1954)) which led to the US Supreme Court overturning the policy of "separate but equal" that had long reigned in the United States with regard to education and other public services. Although *Brown* was ultimately successful, African-Americans' decades-long efforts to obtain remedies for civil rights violations through class litigation were often thwarted by judges' rulings denying class certification on technical bases. The 1966 revision of Rule 23 simplified the structure of federal class actions in order to diminish, if not eliminate, technical barriers to proceeding. See "An Oral History of Rule 23," a transcript of an interview conducted by Samuel Issacharoff with Arthur Miller, who was the assistant to Professor Benjamin Kaplan, the Reporter for the Advisory Committee, 74 *NYU Annual Survey Amer. Law* 105, 109–110 (2018). The 1966 class action reformers seem to have been less committed to the idea of increasing access to the courts for small-value damage claims by providing a mechanism for cost spreading. There was support for facilitating securities and anti-trust class actions but only a few committee members thought enabling claims that individually pursued would be "economically unviable" should be a goal of rule reform. *Id.*, at 111. According to Miller, "when drafted, it [Rule 23] had a modest dimension. There was a sense that in application it would have a limited application. It has proven to have a dimension many times the size of anything conceived of by the people in that room . . . " *Id.*, at 112. As Miller wrote later, the revised rule did facilitate claims that were authorized by the 1970s surge in environmental and consumer protection litigation. Arthur Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem," 92 *Harv. Law Rev.* 664 (1979): 664–94. By the 1990s, the notion that Rule 23 was being used to enable pursuit of what had come to be called "negative value" claims had become part of mainstream legal discourse on the uses and abuses of class actions. See e.g., Henry Monaghan, "Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members," 98 *Colum. L. Rev.* 1148 (1998). See also Linda Mullenix, "Complex Litigation: Negative Value Suits," 26 *Nat'l L.J.* 11 (March 22, 2004).

[14] On the US Chamber of Commerce's lobbying efforts against class actions in Europe and Australia, see Deborah Hensler, "Third-Party Financing of Class Action Litigation in the United States: 1515," 63 *DePaul L. Rev.*, 1101 (2013). As an example of the reach of the US Chamber with regard to class action politics I was once asked to meet with a European civil servant charged with helping shape their country's class action policy outside their office so the Chamber would not be aware they were meeting with me as by this time I had apparently been labeled a supporter of class actions.

[15] The European Union has been debating the adoption of a class action procedure since 2009. To my knowledge, every draft of proposed rules and commentary regarding them include language asserting a desire to avoid "American-style" class actions, often using coded terms such as "abusive" litigation. See e.g., Council of the European Union, "Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers," November 21, 2019, Annex, Paragraph 4: "It is important to ensure the

class members from organizing to pursue litigation. In the United States, corporate counsel, with the strong and consistent support of the US Supreme Court, have pursued a unique strategy for precluding the use of Rule 23: incorporating mandatory arbitration provisions that explicitly forbid collective proceedings within and outside the court in workplace and consumer contracts.[16] Taken together, public and private efforts to provide a mechanism for collective action while tightly restricting its use, have resulted in procedural evolution, rather than revolutionary change.

What explains the proliferation of procedural options for group litigation in so many jurisdictions? Over the past fifty years, economic, political and cultural changes have increased the potential for mass claims for personal and financial injury. Arising out of the same factual circumstances, mass claims arrive at the court's doorsteps within a brief time, challenging even wealthy jurisdictions' courts' ability to deal with them expeditiously. Some attribute the rise of a so-called "compensation culture" to whiney citizens and greedy lawyers seeking lucrative opportunities to litigate.[17] However, the actual explanation is more complicated and implicates economic, social and cultural change. With the expansion of the global economy, there is an increased potential for defective products and fraud and other illegal behavior to affect large numbers of people.[18] The rise of an accountability culture has made the idea of holding

necessary balance between access to justice and procedural safeguards against abusive litigation which could unjustifiably hinder the ability of businesses to operate in the internal market. To prevent the misuse of representative actions, elements such as punitive damages and the absence of limitations as regards the entitlement to bring an action on behalf of the harmed consumers should be avoided and clear rules on certain various procedural aspects, such as the designation and funding of qualified entities the origin of their funds and nature of the information required to support the representative action, should be laid down. This Directive should not affect national rules concerning the allocation of procedural costs." Available at https://data.consilium.europa.eu/doc/document/ST-14210-2019-INIT/en/pdf.

[16] See Katherine Stone and Alexander Colvin, "The Arbitration Epidemic," Economic Policy Institute (EPI) Briefing Paper, December 7, 2015, available at www.epi.org/files/2015/arbitration-epidemic.pdf. This admittedly one-sided assessment of the Supreme Court's endorsement of this strategy cites the key court decisions to 2015. More recent decisions have further precluded class proceedings when contracts include mandatory arbitration clauses. See, e.g., *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407 (2019) (holding that ambiguity in a contract provision regarding collective proceedings cannot be construed in favor of such proceedings). On the relationship between US Supreme Court decisions on civil procedural issues and judges' party affiliation, see Stephen Burbank and Sean Farhang, *Rights And Retrenchment: The Counterrevolution Against Federal Litigation*, Cambridge University Press, 2017 (finding correlations between the party of the president that appointed them and the justices' decisions on access-limiting procedural rules).

[17] See, e.g., [U.K.] House of Commons Constitutional Affairs Committee, Compensation Culture, Third Report of Session 2005–2006, Volume 1, available at https://publications.parliament.uk/pa/cm200506/cmselect/cmconst/754/754i.pdf (in inquiry regarding the consequences of legalizing conditional fee agreements (i.e., "no win, no pay") finding evidence of increased concern about risks of litigation within the business community notwithstanding a lack of evidence of a compensation culture incentivizing increased litigation). See also James Hand, "Compensation Culture: Cliché or Cause for Concern?," 37 *J. Law & Soc* 569 (2010). Hand's article begins with the proposition that there is an American (US) compensation culture, and then proceeds to present evidence of the absence of such a culture in the UK. However, American legal analysts have found little evidence of such a culture in the US. See, e.g., Marc Galanter, "The Day After the Litigation Explosion," 46 *Md. L. Rev.* 3 (1986) and William Haltom and Michael McCann, *Distorting The Law: Politics, Media and the Litigation Crisis*, University of Chicago Press, 2004. Most US civil lawsuits are filed in state courts. State court case filings decreased by 16 percent from 2009 to 2015; tort lawsuits account for about 5 percent of all civil lawsuits in most state courts. See tables available at www.courtstatistics.org.

[18] The European Union has attributed the need for a new EU-wide consumer protection mechanism in part to this phenomenon. See, e.g., European Commission, "Proposal for a Directive of the European Parliament and of the Council on Representative Actions for the Protection of the Collective Interests of Consumers," November 4, 2018, ("... The Risk of infringements of Union law affecting the collective interests of consumers is increasing due to economic globalisation and digitalisation. Traders that infringe EU law may affect thousands or even millions of consumers with the same misleading advertisement or unfair standard contract terms in a number of different economic sectors. In light of increasing cross-border trade and EU-wide commercial strategies, these infringements increasingly also affect consumers in more than one Member State.")

perceived wrongdoers to account for their actions more popular.[19] Legislatures and courts have created new substantive legal rights, facilitating legal action to achieve accountability. The neoliberal mandate to reduce government regulation and recognition of the potential for regulated entities to suborn the regulators have made the notion of relying exclusively on public agencies to identify and sanction bad behavior less attractive.[20] Social media permit rapid sharing of information (and misinformation) about mass harms and naming of wrongdoers. Although there is little evidence that people generally – wherever they reside – are more disputatious than in the past, there are numerous examples of large numbers of people coming forward when mass harms occur to claim compensation or restitution from perceived wrongdoers.[21]

Policy-makers have established a variety of procedural mechanisms to respond to the challenge of mass legal claims. These procedures – all of which are represented in this volume – include:

- "True" class actions in which a representative class member is authorized to file a lawsuit the outcome of which will bind everyone in a class of similarly situated people or entities without regard to whether they have filed legal claims and without them being present in court;[22]
- Actions in which an association or special purpose entity (but not a class member) can litigate to obtain declaratory relief for its members or subscribers, allowing others subsequently to pursue claims for monetary relief, relying on the court's decision on liability in the initial case;[23]
- Actions in which parties with claims arising out of the same law and facts can "register" (or perhaps be required to register) their claims and then be bound by the decision on liability of a court-selected "model" case when they subsequently pursue individual claims for compensation;[24] and
- Settlement vehicles that allow claimants represented by associations or special purpose vehicles and putative defendants to approach the court together to seek approval of a binding settlement, including in instances where defendants have not been formally held liable by a court.[25]

Many of the jurisdictions that have adopted these procedures refer to them formally or colloquially as class actions (albeit intended only for "collective redress") and debates surrounding their

[19] Corporate social responsibility initiatives exemplify this culture, as does management rhetoric urging leaders to build a culture of accountability in the workplace. See, e.g., Zack Dugow, "Three Steps for Building a Culture of Accountability," Forbes, June 27, 2019 at www.forbes.com/sites/forbestechcouncil/2019/06/27/three-steps-for-building-a-culture-of-accountability/#7b30bdb310a0; A. Crane, et al. "The Corporate Social Responsibility Agenda," in *The Oxford Handbook of Corporate Social Responsibility*, Oxford University Press, 2008; Thomas Jones, "Corporate Social Responsibility Revisited, Redefined," 22 *Calif Management Rev* 59 (1980).

[20] For a discussion of regulatory capture in the context of the Volksvagen "clean diesel" scandal, see Thomas Eger and Hans-Bernd Schaefer "Reflections on the Volkswagen Emissions Scandal," (January 25, 2018). Available at SSRN: www.govinfo.gov/content/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf.

[21] For case studies of mass claims resolved through group actions, see Deborah Hensler, Christopher Hodges, and Ianika Tzankova, *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation*, Edward Elgar, 2016.

[22] Exemplified by the Australian, Canadian, Israeli and US class action procedures, and now – albeit with a different structure – the new Netherlands collective action statute effective January 1, 2020.

[23] Exemplified by the Dutch class action statute as adopted in 1995.

[24] Exemplified by the German KapMuG and English Group Litigation Order.

[25] Pioneered by the Dutch WCAM adopted in 2005 and since emulated by other Western European jurisdictions.

adoption frequently reference "American-style class actions," although only a minority incorporate the key ingredients of Fed. R. Civ. P. 23, the US class action rule.

The implementation of class actions or other group procedural mechanisms may differ in myriad ways; procedures that seem on the surface to be the same or very similar may in practice operate differently as they intersect with other aspects of the litigation regime – rules, cultural expectations, political contexts – in which they are inserted. The rich literature on "legal transplants" details the consequences of borrowing a rule, procedure, or institutional design from another jurisdiction.[26] Keeping this in mind, it is still useful to engage in comparative analysis of the structural features of the class action and group procedural mechanisms that have been adopted over the last fifty years. The key differences among class actions are:

Scope: What types of substantive legal claims can be brought forward using the class or group procedure?

Standing: Who (what person or entity) may come forward to represent the class? (Note that this question does not arise for purely aggregative procedures that allow group treatment for some aspects of litigation but only for individually filed claims.)

Opt Out versus Opt In: Is every person or entity that fits the definition of the class automatically included in the litigation unless they proactively remove themselves, or must members of the putative class come forward to sign up to the litigation? (This question also does not arise for procedures that aggregate individually-filed claims, which by definition have "opted in.")

Remedies: Is the sole remedy injunctive or declaratory relief, or can the class obtain damages through the class or group litigation, without subsequent individual litigation?

Binding versus Nonbinding Outcomes: in a true class action every class member who has opted in or declined to exercise their opt-out right is bound by the outcome, including decisions on damages.[27] By contrast, procedures that aggregate individual claimants may produce a decision on the law and facts that is *res judicata* but not determinative of the outcome of subsequent individual claims. And procedures that permit associations to come forward to litigate on behalf of their members may provide redress to their members but not other similarly situated claimants who are not association members.

Financing: not a formal part of most jurisdictions' class action rules, the rules that govern financing of civil litigation (often incorporated in rules of professional responsibility) play a critical role in whether a class action procedure – whatever its form – will be used.

[26] The notion of "legal transplants" was introduced by Alan Watson. *Id.*, *Legal Transplants: An Approach to Comparative Law*, University of Georgia Press, 1976. See also Jaako Husa, "Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law," 6 *Chinese J. Comp. Law* 129 (2018) (describing how "path dependence" has affected the adoption of a "rule of law" paradigm in China and Poland). The new Dutch collective action statute might be regarded as an "internal legal transplant," as experience with WCAM as well as knowledge of common law class action regimes encouraged lawmakers to extend class action remedies outside the settlement context to include damages.

[27] In a regime in which putative class members must decide whether to be part of the class before the merits are decided they are required to accept the risk that they will not prevail in court on the merits, in which case they will be barred from obtaining compensation. On the face of Rule 23, decisions to opt-out must be made early in the litigation. (Rule 23 (c) (1) (a) instructs the judge presiding over the litigation to decide certification at "an early practicable" time. By inference, notice would then follow.) In practice, however, most damage class actions take the form of "settlement class actions," in which the required notice to putative class members includes information both about the pendency of the action and about the proposed settlement, including compensation amount and lawyers' fees. On settlement class actions as the prevailing mode of damage class actions in the United States, notwithstanding the lack of a rule authorizing same, see Deborah Hensler, "Opioid Negotiation Class May Be Organic Procedure Evolution," Law360, September 30, 2019, available at www.law360.com/articles/1204097/opioid-negotiation-class-may-be-organic-procedure-evolution.

Virtually all of these design features of collective litigation procedures evoke sharp controversy when policy-makers debate adopting them, with corporate lobbies and their allies generally pressing for features that will limit their use, and consumer, worker and environmental advocates pressing for procedural designs that they hope will enable litigation. Wielding a broad brush, one might conclude that trans-substantive procedures that grant standing to class members to represent a class of all similarly situated claimants who do not opt out, provide damages as well as equitable remedies to class members and incentivize lawyers or third-parties to finance the litigation are more likely to be used than procedures that are narrow in scope, incorporate restrictive standing rules and require class members to opt in, limit remedies to injunctive or declaratory relief and restrict funding sources. But in practice collective and group litigation design choices are more complex, as they interact in sometimes unanticipated ways with other features of civil justice regimes and implicate multiple and sometimes competing goals of civil litigation. Moreover, over time collective and group litigation procedures evolve as judges, practitioners and interest groups become more comfortable with the idea and reality of litigating on behalf of mass claimants.

SCOPE

When jurisdictions adopt class action or nonclass group procedures, they often limit the applicability of the procedure to one or a few specific types of substantive claims. Often this is the outcome of intensive lobbying by corporate opponents of class actions. In the face of such controversy, legislators strike a compromise by only authorizing the use of a collective procedure in a single area.[28] Logically, the impact of these procedures will be less than for "trans-substantive" procedures of the type familiar to common law jurisdictions. As a practical matter, if a procedure can only be used in a single area of the law, fewer lawyers – and judges, if there are specialized courts in the jurisdiction – will become familiar with the procedure, which may slow its incorporation into the local legal culture. Despite this, there are examples of jurisdictions that have adopted class action procedures or group litigation procedures for use in one area of substantive law only but later expanded their use to other types of substantive legal claims. In an era of increased demand for accountability, citizens who are aware that procedures exist for facilitating mass claiming in one area may press policy-makers to make these available for an incident that seems to call out for a new procedure. The Netherlands is an example of a jurisdiction that first adopted a collective settlement procedure – WCAM – to enable pharmaceutical manufacturers to resolve mass product defect claims and later accepted the application of the procedure to shareholder and other financial claims.[29] Israel,[30] Brazil[31] and France[32] are other examples of jurisdictions where

[28] Germany and France both offer recent examples of these political dynamics. In Germany, as related by Halfmeier in this volume, the Green Party pushed for adoption of a broad collective litigation procedure but the model declaratory action was narrowly drawn to apply to consumer claims brought by a single long-standing consumer organization. In France, as described by Maria José Azar-Baud and Véronique Magnier in this volume, different sector-specific procedures were adopted serially.

[29] Ianika Tzankova and Deborah Hensler, "Collective Settlements in the Netherlands: Some Empirical Observations," in Christopher Hodges and Astrid Stadler, *Resolving Mass Disputes: ADR and Settlement and Mass Claims*, Edward Elgar, 2013.

[30] Amichai Magen and Peretz Segal, "Israel," in Deborah Hensler, Christopher Hodges and Magdalena Tulibacka, *The Globalization of Class Actions*, 622, Annals of the American Academy of Political and Social Science 244, 245 (March 2009).

[31] Carlos Portugal Gouvêa and Helena Campos Refosco, "Class Actions in Brazil: Overview, Current Trends and Case Studies," this volume.

[32] Maria José Azar-Baud and Véronique Magnier, "Class Action *à la française*," this volume.

the scope of class actions has been extended over time. As a political matter, the gradual expansion of the procedure to incorporate other substantive legal claims suggests that the "camel's nose under the tent" concern of class action opponents is well-grounded.

Extending authorization for class actions from one substantive law domain to another, however, is not a sure thing. Germany is perhaps the most recent example of a jurisdiction that long resisted extending the use of a group proceeding from the first category of substantive law in which it was authorized – shareholder claims – to a second area, consumer claims. As described by Halfmeier in this volume,[33] the KapMuG is properly described as an aggregative procedure in which a "model case," selected from a register of individual claims arising from the same facts, yields a decision on common facts and law that is *res judicata* for subsequent individual litigation by those whose claims were registered. In contrast, the "model declaratory action" (Musterfeststellungsklage) for consumer claims authorizes a previously established consumer organization to seek declaratory relief on behalf of consumers who, if the organization prevails, are then bound by the court's decision on common facts and law when suing individually for damages. To claim the benefit of the Musterfeststellungsklage procedure in subsequent individual damage actions, individuals must opt in. Consistent with the discussion above on the factors propelling the spread of collective litigation procedures, the German legislature adopted the procedure under pressure from German Volkswagen owners who chafed at the fact that they were precluded from seeking monetary compensation for the company's fraudulent installation of devices to enable the automobiles to violate pollution standards, while under the terms of class action settlements consumers in the United States and Canada were able to secure generous compensation. To date, more than 400,000 German consumers have opted in to the procedure. Although the German legislature adopted this second group litigation procedure, it has resisted to date pressure to extend such procedures to other substantive law domains.[34]

STANDING

Common law jurisdictions that have adopted class action procedures, including Australia, Canada, Israel and the United States, authorize an individual member of the putative class (which may comprise natural persons or entities such as small businesses) to come forward to represent the class.[35] The Canadian, Israeli and US procedures all require a judge to certify a class action; Australia has no such requirement but a defendant against whom an action is brought may challenge its appropriateness for class treatment. An important issue for the judge to decide in the certification process is whether the putative class plaintiff can properly represent the class. In US law, the criteria are "typicality" – are the plaintiff's claims typical of those of the class members? – and "adequacy of representation" – usually interpreted as whether the plaintiff has the resources to pursue the litigation to the benefit of the class, but also potentially teeing up the issue of whether the class members' interests are so heterogenous that no one or even a few class members can represent all.[36] In sum, common law class action procedures prioritize the

[33] Halfmeier, "Collective Litigation in German Civil Procedure," this volume. [34] *Id.*

[35] As described by Nikki Chamberlain and Susan Watson in this volume, New Zealand's current class action regime has evolved piecemeal from judicial interpretation of the representative action rule inherited from the British. A review of the area with an eye to procedural reform is currently underway. In practice, representative litigation in New Zealand has been brought by class members deemed properly representative of a class of others with common interests.

[36] *Amchem Prods.* v. *Windsor* – 521 U.S. 591, 117 S. Ct. 2231 (1997) (vacating certification of a class of future asbestos claimants on these grounds but holding forth the possibility that the problem could be cured by establishing "subclasses," each with its own representative and counsel).

identity of the class representative with class members. The concern of policy-makers and judges is that the interests of class members be well-represented.

In the United States, concerns about "agency costs" – potential conflicts of interest between parties and their representatives – focus on *class counsel* not class representatives.[37] What De Wulf, describing the evolution of collective litigation procedures in Belgium in this volume, terms the "bounty hunter" model of entrepreneurial litigation is understood to apply to the incentives of class counsel to invest in litigation, celebrated by some and reviled by others.[38] To assure that the class representative is not in cahoots with class counsel to advantage the former in relation to other class members, the judge presiding over the case appoints class counsel – including if they wish holding a competition of lawyers seeking the position – and if, and only if, the class prevails, the judge awards lawyer fees and expenses.[39] Moreover, judges are required to review and approve the "fairness, reasonableness and adequacy" of any proposed class action settlement, after a call for objections and a public hearing. In contemporary American practice, proposed attorney fees come in for scrutiny as well and an active objector practice identifies potential conflicts of interest among class members and between class counsel and class members.[40] To minimize incentives for bounty-hunting class members, incentive payments to representatives to cover their time and expenses are strictly limited in American case law.[41]

In Canada, the putative class representative retains class counsel but the judge presiding over the case reviews the retainer agreement, including any third-party financing provisions (discussed further below in Model 2: Third-Party Funding). In Australia federal judges for several years adopted the practice of reviewing financial arrangements among class representatives, class counsel and funders at the conclusion of a case and, invoking a "common fund" doctrine borrowed from the United States, used their discretionary power to assure fairness of allocation of benefits and costs among class members. In December 2019, a divided High Court held that federal judges do not have the power under the federal (and New South Wales) statutory class action regime to issue common fund orders, sending this system into disarray.[42]

[37] See, e.g., John Coffee, "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) and Michael Dorf, "The Indictment of the Milberg Weiss Law Firm and America's Love/Hate Relationship with Class Action Litigation," FindLaw, May 22, 2006, available at https://supreme.findlaw.com/legal-commentary/the-indictment-of-the-milberg-weiss-law-firm-and-americas-lovehate-relationship-with-class-action-litigation.html.

[38] *Id. See also* Deborah Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, RAND, 2000.

[39] FRCP 23(g) and 23(h). A dramatic example of the failure of strictures against collusion between class counsel and class representatives in federal law occurred when lawyers at Milberg Weiss, which at one time was the largest plaintiff securities class action firm in the United States, put together a roster of individual shareholders to whom they promised kick-backs for agreeing to serve as class representatives. See Harrison Smith, "Obituaries: Melvin I. Weiss, Class Action King Felled By Kickback Scheme Dies at 82," *Washington Post*, February 6, 2018, available at www.washingtonpost.com/local/obituaries/melvyn-i-weiss-class-action-king-felled-by-kickback-scheme-dies-at-82/2018/02/06/8fe2140e-0b4e-11e8-8b0d-891602206fb7_story.html. A founding partner of Milberg, Weiss, Mr Weiss was also noted for playing a leading role in the Holocaust litigation against Swiss banks, in which he served pro bono. Pursued by federal investigators for his role in the kickback scheme, he was indicted for racketeering, served a year in prison and paid millions in fines. Others in the firm and the firm itself were also indicted. To my knowledge, there have been no other reports of such kickback schemes although there is anecdotal evidence of defendants paying off potential class representatives and lawyers in exchange for the latter agreeing not to pursue a class action.

[40] FRCP 23 (e). See especially 23 (3) (e) (2), directing the judge's attention to various provisions of a proposed settlement.

[41] Federal case law allows "incentive payments" to class representatives, but amounts must be approved by the judge presiding over the litigation and are generally for modest amounts. See Theodore Eisenberg and Geoffrey Miller, "Incentive Awards to Class Action Plaintiffs: An Empirical Study," 53 *UCLA L Rev* 1303 (2005–2006).

[42] *BMW Australia Ltd* v. *Brewster & Anor* and *Westpac Banking Corporation & Anor* v. *Lenthall & Ors*, HCA 45 (2019). Vince Morabito, "An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders,

In contrast to the common law model, most civil law jurisdictions in Europe and Asia seek to put distance between the class representative and the class by granting standing only to associations or special purpose foundations.[43] In some jurisdictions, these associations must have been authorized by the government to bring collective actions before suing. For example, in Taiwan, a private foundation that is publicly funded and overseen by Taiwan's Securities & Exchange Commission was established in 2003 by the Securities Investors and Fortunes Trade Protection Act to bring damage class actions on behalf of investors.[44] In Japan, standing to file consumer class actions is limited to "qualified consumer organizations" certified by the Prime Minister.[45] In Germany, only one consumer protection organization is authorized currently to bring model declaratory actions on behalf of consumers.[46] In France, where class actions have been authorized using a "sector" by "sector" approach, only preestablished registered associations devoted to pursuing interests regarding the relevant sector – that is, consumer protection, health care delivery – have standing to sue, and judges decide whether the group bringing the action has satisfied the standing requirement during an admissibility process akin to common law jurisdictions' certification process.[47] Under the most recent amendment of the collective litigation regime in Belgium, business interest associations as well as preexisting consumer organizations may bring representative actions.[48] Dutch standing rules are less restrictive: standing is granted not only to preexisting associations – for example, consumer protection associations – but also to "special purpose vehicles" – foundations established especially to pursue the instant collective action or collective settlement.[49] Jurisdictions that adhere to the association model of class actions generally prohibit these associations from benefiting financially from the litigation – for example, by receiving compensation beyond their expenses that they might then plough back into the organization's coffers to subsidize their activities. This creates a necessity for outside funding, that has led to reliance on third-party entrepreneurial funders, as discussed below in Model 2: Third-Party Funding. Ironically, these funders generally are not subject to strict regulation.

Although granting standing to individual class members may create an opportunity for abuse if a class representative colludes with class counsel to design a settlement agreement that benefits both of them at the expense of other class members – an opportunity that judicial oversight is intended to prevent in common law jurisdictions – it is unclear how limiting standing to preexisting or government-authorized organizations much less to special purpose vehicles formed with the intent of winning damages solves the problem of potential conflicts of interest

Funding Fees and Reimbursement Payments" (January 31, 2019), chapter 3, "Common Fund Orders in Federal Class Actions." Available at SSRN: https://ssrn.com/abstract=3326303.

43 There are exceptions to this observation. In Denmark, a court may appoint a class member to represent a class on an opt-in basis, but only the consumer ombudsman, a public official, is authorized to bring an opt-out class action on behalf of consumers. Opt-in class actions may be admitted by the court for any substantive legal claim over which it has jurisdiction, provided other requirements are met. Eric Werlauff, "Class Actions in Denmark," in Deborah Hensler, Christopher Hodges and Magdalena Tulibacka, *The Globalization of Class Actions*, 622 The Annals of the American Academy of Political and Social Science, 201, 204 (Mach 2009).

44 Kuo-Chang Huang, "Using Associations as a Vehicle for Class Actions: The Example of Taiwan," in Deborah Hensler, Christopher Hodges and Ianika Tzankova, *Class Actions In Context: How Culture, Economics And Politics Shape Collective Litigation*, Edward Elgar, 2016, at 81.

45 Taeko Morita and Daisuke Eguchi, "A Review of the Current Status of, and Future Issues Facing Consumer Class Action Systems in Japan," this volume. Actions for injunctive relief may be brought only by a certified qualified consumer organization. Actions for damages may be brought only by specially selected organizations within the list of qualified consumer organizations.

46 Halfmeier, "Collective Litigation in German Civil Procedure," this volume.

47 Maria José Azar-Baud and Véronique Magnier, this volume.

48 De Wulf, this volume.

49 Tzankova and Hensler, *supra* note 30.

among class members, between class members and class representatives and between class members and counsel. Nor does practice support the proposition. In a large-scale high-value consumer litigation against Dexia Bank in the Netherlands, the Dutch consumer protection organization Consumentenbond that took the lead in the litigation found itself facing angry members when it agreed to a settlement that not all of its members found attractive; subsequently, the organization vowed not to take on a prominent role in future class actions.[50] In a more recent WCAM settlement, an eyepopping $1.5 billion settlement of claims against Fortis bank deriving from the global financial crisis, several special purpose foundations, a long-standing investor association (VEB) and a commercial recovery service (Deminor) joined with Fortis' successor (Ageas) in petitioning the Amsterdam Court of Appeals to approve their previously negotiated settlement. The several associations asserted claims on behalf of investors who had signed onto their efforts and agreed to share some of their proceeds from the settlement (termed "success fees") with their chosen association (termed "active claimants") as well as on behalf of other affected investors ("inactive claimants"). The parties initially submitted to the court a settlement agreement that provided substantially different recoveries to the so-called active and non-active claimants, but when the court refused to approve this arrangement, the settlement terms were revised to eliminate this distinction with regard to calculations of recoveries. Settlement provisions with regard to the fees of different claimant organizations were not revised, but the court did object to a 25€ million "success fee" recovered by VEB, apparently on the grounds that a nonprofit membership association should not benefit from litigating on behalf of a broader interest group.[51] Notwithstanding the difference in standing rules between "American-style class actions" and the Dutch associational model, settlement dynamics and allocation of damages and fees between lawyers and shareholders in this litigation seem remarkably similar to what one would observe in an American shareholder class action.[52]

OPT IN VERSUS OPT OUT

Class actions in common law jurisdictions generally permit the litigation to go forward without first identifying all those who will be bound by it; by contrast, most civil law jurisdictions have preferred opt-in regimes. Opt-out regimes are criticized by those opposed to class actions on the grounds that they deny individual autonomy and hence violate constitutional rights. Although putative class members in opt-out regimes have a choice as to whether to remain a part of the class, the not unreasonable argument is that many class members may not be aware that a litigation is going forward on their behalf and hence will not exercise their rights. Stringent notice requirements, including widespread media campaigns, are intended to mitigate this risk but it still seems likely that some will miss this information. In practice, putative class members are most likely to miss out on information about the litigation and fail to exercise their rights when the amounts of potential recovery are small. Requiring an opt-in regime in such situation will either result in no lawsuit at all or substantially limit defendants' potential financial exposure. As a result, the deterrence effect of collective litigation is much reduced. In contrast,

[50] Tzankova and Hensler, *supra* note 30.

[51] This description of the Fortis settlement relies on Jonathan Richman and Ianika Tzankova, "Fortis Case Confirms Viability of Dutch Settlement Law," Law360, July 27, 2018; Kevin Lacroix, "Dutch Court Declares Largest Ever European Investor Claims Settlement Binding," the D & O Diary, July 2018; and conversations with Prof. Ianika Tzankova. The lawyers acting for the claimants included at least two US law firms, Grant & Eisenhofer and Kessler, Topaz, Metler, Check.

[52] Whether the stronger Claim Code adopted in 2011 or the new requirements for claim organizations included in the new collective action statue will change these dynamics remains to be seen.