

NOTE

THE VIABILITY OF CLASS ACTION LAWSUITS IN A GLOBALIZED ECONOMY—PERMITTING FOREIGN CLAIMANTS TO BE MEMBERS OF CLASS ACTION LAWSUITS IN THE U.S. FEDERAL COURTS

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INTRODUCTION

The class action, which allows a single, representative plaintiff to bring a lawsuit on behalf of a large group of similarly situated claimants,<sup>1</sup> is a popular—albeit controversial<sup>2</sup>—procedural device for litigating claims in the U.S. courts.<sup>3</sup> Its popularity stems from its ability to combine multiple claims against the same defendant into one large lawsuit. This serves a dual purpose: First, it conserves judicial and party resources by binding absent class members to the final class set-

<sup>1</sup> See 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 1.01 (3d ed. 1992). While defendant class actions are possible under the Federal Rules of Civil Procedure, see *id.* § 4.45, they are rare, and so will not be discussed in this Note.

<sup>2</sup> The class action lawsuit has been characterized as “the most controversial of all the proposed judicial remedies for consumer grievances.” *Id.* § 1.01 n.5 (quoting REDRESS OF CONSUMER GRIEVANCES: REPORT OF THE NATIONAL INSTITUTE FOR CONSUMER JUSTICE 27 (1973)). Consumer advocates and government regulators champion the class action. See, e.g., DEBORAH R. HENSLE ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 4 (2000). Many others—corporate representatives among them—argue that the class action lawsuit is a form of “legalized blackmail,” which benefits class action attorneys more than claimants and coerces multimillion dollar settlements from defendants through the threat of costly, large-scale litigation. See, e.g., SENATE COMM. ON THE JUDICIARY, 108TH CONG., THE CLASS ACTION FAIRNESS ACT OF 2003, S. REP. NO. 108-123 (2003) (citing as one of the major reasons for class action reform the fact that many class settlements “enrich class counsel” rather than the injured consumers); see also Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 664 (1979) (discussing the debate for and against the class action device). A more detailed examination of these anti-class action sentiments is beyond the scope of this Note.

<sup>3</sup> Many legal scholars acknowledge an increase in the use of class action litigation, particularly in the areas of securities, antitrust, and consumer protection law. See, e.g., HENSLE ET AL., *supra* note 2, at 3 (“Class actions . . . seem to be growing in number and variety.”); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 402 (2002) (referring to a “mushrooming of class action practice” in the United States); Press Release, Stanford Law School Securities Class Action Clearinghouse, Thirty-One Percent More Securities Class Action Suits Filed in 2002 than in 2001 (Mar. 13, 2003) (“Federal securities class action litigation suits increased by 31 percent between 2001 and 2002, rising from 171 to 224 filings.”), available at [http://securities.cornerstone.com/pdfs/3\\_03PR.pdf](http://securities.cornerstone.com/pdfs/3_03PR.pdf). But see David J. Bershad et al., *A Dissenting Introduction*, in SECURITIES CLASS ACTIONS, at 5, 12 (Edward J. Yodowitz et al. eds., 1994) (noting that “there is simply no evidence to support the assertion that there had been any marked increase in the number of securities suits” and that “the number of securities class actions filed and pending each year has remained relatively constant”).

tlement or judgment, thereby minimizing the number of separate lawsuits against the same defendant on the same set of facts.<sup>4</sup> Second, it provides a cost-effective method for injured parties to litigate small claims.<sup>5</sup>

In some areas of law—particularly securities, antitrust, and consumer protection—corporate wrongdoing often results in relatively small financial losses to scores of individual investors or consumers.<sup>6</sup> Even though the aggregate harm upon society may total millions of dollars, the small losses suffered by each individual claimant make independent lawsuits economically impracticable. In such cases, a class action lawsuit is often the only cost-effective method of litigating claims.<sup>7</sup> Without the class action device, small-time investors and purchasers would have no recourse in the courts, and corporations engaging in fraud, overcharging, or other abuse of the consumer would

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<sup>4</sup> 1 NEWBERG & CONTE, *supra* note 1, §§ 1.01 & 1.07. Since Rule 23 permits potential claimants to “opt out” of class action lawsuits, which preserves their ability to bring independent lawsuits on the same set of facts, the class action device cannot provide complete finality. See *infra* Part I.B.2 (discussing the opt-out procedure in greater detail). Few litigants actually opt out of class action lawsuits, however, so most class action lawsuits do resolve all similarly situated claims. See *id.*

<sup>5</sup> See *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))); 1 NEWBERG & CONTE, *supra* note 1, § 1.06, at 1-18 (“[T]he class action serves to afford individual claimants with small claims access to judicial relief that otherwise would be economically unavailable by means of individual litigation.”); STUART T. ROSSMAN & DANIEL A. EDELMAN, *CONSUMER CLASS ACTIONS: A PRACTICAL LITIGATION GUIDE* §1.1.1, at 3 (5th ed. 2002) (“A class action may be the only economically viable way to provide legal representation for clients with relatively small claims.”).

<sup>6</sup> See, e.g., THOMAS E. WILLGING ET AL., *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 13* (1996) (detailing the average recoveries of individual class members in class action lawsuits from four federal districts); *Contact Lens Pricing Litigation: Roberts v. Bausch & Lomb, Inc.*, in *CLASS ACTION DILEMMAS*, *supra* note 2, at 145, 155 (estimating damages to each individual consumer in consumer class action at \$50 to \$500, with a class consisting of as many as three million people).

<sup>7</sup> See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“Class actions also may permit plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuits involves claims averaging about \$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.”); *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) (noting that “[c]lass actions are a particularly appropriate and desirable means to resolve claims based on the securities laws”); *Carr v. Trans Union Corp.*, No. 94-0022, 1995 U.S. Dist. LEXIS 567, at \*7-8 (E.D. Pa. Jan. 12, 1995) (“Class actions are often the most suitable method for resolving suits to enforce compliance with consumer protection laws because the awards in an individual case are usually too small to encourage the lone consumer to file suit.”); *Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 378 (D. Del. 1990) (“The class action device is especially appropriate in securities fraud cases . . . wherein there are many individual plaintiffs who suffer damages too small to justify a suit against a large corporate defendant.”); *Bershad et al.*, *supra* note 3, at 6 (“It is widely accepted that class actions are the only practical procedural device for litigating claims of alleged securities violations.”).

keep millions of dollars in ill-gotten gains.<sup>8</sup> By combining multiple claims against the same defendant, the class action mechanism gives power to these small claims,<sup>9</sup> ensuring that victims have their day in court and that corporations “disgorge significant profits arising from unlawful or tortious conduct.”<sup>10</sup> In this sense, the class action device serves as a regulatory mechanism, creating a class of “private attorneys general” that protect the public interest through private litigation.<sup>11</sup>

When all potential claimants in a class action lawsuit are domestic (U.S. citizens or residents), the efficiency and deterrent functions of the class action are harmonious. When foreign claimants are inserted into the equation, however, this compatibility falters. In order to protect the deterrent function of the class action device, the court must allow the maximum number of potential claimants—both domestic and foreign—into the lawsuit. But even though U.S. courts have the authority to bind foreign class members to the final class settlement or judgment—and thereby prevent foreign class members from suing again, on the same set of facts, in another U.S. court—they cannot prevent foreign class members from suing again in the courts of their home countries.<sup>12</sup> Many foreign courts routinely refuse to enforce U.S. judgments, particularly those arising from class litigation, and no international judgment-enforcement treaty exists that compels foreign courts to recognize or give effect to U.S. judgments.<sup>13</sup> Thus, while permitting foreign claimants to join U.S. class action lawsuits enhances deterrence, it jeopardizes the binding force of the class action lawsuit, and therefore its economy, consistency, and finality. This inability to prevent foreign claimants from suing again in foreign courts also creates a fundamental unfairness between class claimants and defendants: Class defendants are forced to defend against a complex, resource-intensive class action without any guarantee of finality.

Federal Rule of Civil Procedure 23 does not explicitly mention foreign claimants. In today’s economy, however, companies increasingly merge across borders and sell their products and securities worldwide. In such a globalized marketplace, acts of corporate misconduct—whether committed in the United States or abroad—injure

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<sup>8</sup> See, e.g., Bershad et al., *supra* note 3, at 7 (observing that the class action device “is the only thing that enfranchises” many small-time investors).

<sup>9</sup> See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 186 (1974) (Douglas, J., dissenting in part) (“The class action is one of the few legal remedies the class claimant has against those who command the status quo.”); ROSSMAN & EDELMAN, *supra* note 5, § 1.1.2 (discussing the multimillion dollar pay-outs brought about by various consumer class actions).

<sup>10</sup> 1 NEWBERG & CONTE, *supra* note 1, § 1.01, at 1-3.

<sup>11</sup> The “private attorney general” is an interesting legal fiction that is unique to American jurisprudence. For a discussion of the “private attorney general” idea, see HENSLEY ET AL., *supra* note 2, at 71-72 and 1 NEWBERG & CONTE, *supra* note 1, § 1.06, at 1-19.

<sup>12</sup> See *infra* Part II.A.

<sup>13</sup> See *infra* Part II.A.

both U.S. and foreign investors and consumers. Since few other countries have group or representative litigation devices,<sup>14</sup> foreign victims often avail themselves of the class action device in order to bring their claims in U.S. courts. As a result, U.S. federal judges increasingly entertain motions to certify mixed U.S.-foreign claimant classes.

The recent shareholders' action against automobile manufacturing giant DaimlerChrysler is an excellent example. In 1998, Daimler Benz, a German automobile manufacturer, merged with Chrysler, an American automobile manufacturer, to form DaimlerChrysler AG, a German corporation.<sup>15</sup> In the press and Proxy/Prospectus, Daimler Benz executives billed the transaction as a "merger of equals" rather than a takeover.<sup>16</sup> Daimler Benz executives promised that after the merger Daimler Benz and Chrysler would share "equal power, management and governance" within the new corporation.<sup>17</sup> This promise of equal power led Chrysler shareholders to approve the merger.<sup>18</sup>

According to Chrysler shareholders, this "merger of equals" never took place.<sup>19</sup> Instead, once the merger was completed, Daimler Benz executives fired key Chrysler management and reorganized Chrysler so that it was little more than a division of Daimler Benz.<sup>20</sup> Chrysler shareholders from around the world filed suit against DaimlerChrysler AG and its officers and affiliates alleging that Daimler Benz's pre-merger representations and post-merger conduct violated the Securities Act of 1933 and the Securities and Exchange Act of 1934.<sup>21</sup>

Given the large number of Chrysler shareholders, plaintiffs pursued the suit as a class action. When *DaimlerChrysler* came before the court for class certification, however, plaintiffs encountered a major problem: Judge Farnan, the Maryland district court judge assigned to plaintiffs' motion for class certification, refused to certify a class consisting of both foreign and domestic claimants.<sup>22</sup> Judge Farnan believed that since foreign claimants could sue again in foreign courts, a class consisting of foreign claimants was no longer "superior to other available methods for litigating the claims."<sup>23</sup> Therefore, Judge Far-

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<sup>14</sup> See Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 37 TORT & INS. L.J. 999, 1019-24 (2002); Thomas D. Rowe, Jr., Foreword, *Debates Over Group Litigation In Comparative Perspective: What Can We Learn From Each Other?*, 11 DUKE J. COMP. & INT'L L. 157, 157-58 (2001); Sherman, *supra* note 3, at 401.

<sup>15</sup> *In re DaimlerChrysler AG Sec. Litig.*, 216 F.R.D. 291, 294 (D. Del. 2003).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Tracinda Corp. v. DaimlerChrysler AG*, 197 F. Supp. 2d 42, 51-53 (D. Del. 2002).

<sup>21</sup> *Tracinda Corp. v. DaimlerChrysler AG*, 197 F. Supp. 2d 86, 89-90 (D. Del. 2002).

<sup>22</sup> *In re DaimlerChrysler*, 216 F.R.D. at 301.

<sup>23</sup> *Id.* at 300-01.

nan certified a class consisting of only domestic plaintiffs. Judge Farnan did not explain what other methods of litigation he believed were available to the foreign claimants and did not examine the likelihood that foreign claimants could actually sue again in foreign courts, but he excluded all foreign claimants nonetheless.

Judge Farnan's decision to certify a class of only domestic claimants benefited no one. On the one hand, DaimlerChrysler now faced a major, resource-intensive class action lawsuit in federal court. On the other hand, hundreds of foreign claimants, who were equally wronged by the conduct of Daimler Benz and its executives, were without a remedy in U.S.—or any other—courts.

As the *DaimlerChrysler* case illustrates, U.S. federal judges are unsure how to treat foreign claimants when they seek to join class action lawsuits. While federal courts have confronted the question of whether to certify foreign classes for at least three decades,<sup>24</sup> to date there is little consensus on how to resolve this issue. Federal Rule 23 provides no guidance on the subject of foreign class members, the U.S. Supreme Court has never granted certiorari to resolve the question, and the lower courts have taken a wide range of approaches. Judges are left to their own discretion to decide whether to permit or deny foreign claimants access to class action lawsuits. This wide discretion creates a great deal of inconsistency. Many judges prefer to avoid the potential enforcement concerns introduced by foreign claimants by categorically refusing to certify classes including foreign claimants.<sup>25</sup> Judge Farnan's decision to exclude foreign claimants

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<sup>24</sup> See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 977–78 (2d Cir. 1975).

<sup>25</sup> See, e.g., *id.* at 997 (denying Canadian investors access to securities class action); *In re DaimlerChrysler*, 216 F.R.D. at 291 (excluding foreign investors from securities class action); *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 127 F.R.D. 454, 459–60 (S.D.N.Y. 1989) (refusing to certify class consisting of British claimants); see also *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 305 n.57 (S.D.N.Y. 2003) (suggesting, through a discussion of *Ansari v. New York Univ.*, 179 F.R.D. 112 (S.D.N.Y. 1998), that the inclusion of large numbers of foreign claimants is a legitimate ground for denial of class certification because the foreign claimants' "ability to file suits in their home countries undermines the *res judicata* effect and advantage of proceeding as a class action"); *Ansari*, 179 F.R.D. at 116 (suggesting that the existence of foreign claimants "counsels against a finding that the class action is superior to other forms of litigation" because of *res judicata* concerns).

Some judges refuse to certify classes containing foreign claimants on the grounds that the U.S. courts are responsible for protecting only U.S. citizens, not injured foreigners. See, e.g., *Bersch*, 519 F.2d at 996 ("United States courts have no reason to become involved, and compelling reason *not* to become involved, in the burdens of enforcement and the delicate problems of foreign relations and international economic policy that extraterritorial application may entail." (quoting *Inv. Props. Int'l, Ltd. v. I. O. S., Ltd.*, [1970-1971 Transfer Binder] Fed. Sec. L. Rep. (CCH), ¶ 93,011, at 90,735 (S.D.N.Y. Apr. 21, 1971), *aff'd without opinion* (2d Cir. 1971) (unreported)); see also Faulk, *supra* note 14, at 1000 ("Although 'globalism' may be useful as a commercial cliché, its intrusion into jurisprudence is disturbing, especially when procedural devices that are not yet recognized internationally are used to resolve claims arising from conduct that occurs beyond the forum state's borders.").

from the *DaimlerChrysler* securities litigation is a perfect example.<sup>26</sup> Those judges who prioritize deterrence, on the other hand, are permitting foreign claimants access to class action lawsuits despite the increased enforcement and procedural risks that foreign claimants may introduce.<sup>27</sup>

This ad hoc approach to certification is not desirable. As the number of foreign class members steadily increase, the federal courts must devise a more coherent set of guidelines for certifying classes containing foreign claimants. This Note argues that the federal courts should adopt a default presumption in favor of including foreign claimants in small claim securities, antitrust, and consumer class action lawsuits. Only if defendants can affirmatively prove in their affidavits that the foreign claimants have an adequate alternative remedy either in the U.S. courts or the courts of their home countries—which, this Note will argue, is not realistic in the majority of cases—should federal judges exclude foreign claimants from class action lawsuits.

Part I of this Note provides background on the history and procedure of class action lawsuits in the U.S. federal courts. Part II discusses the problems created when foreign claimants join federal class action lawsuits. Part III examines the objectives that compel the use of class action lawsuits as an alternative to individual litigation, in an effort to understand why, despite the increased procedural burdens introduced by foreign claimants, the legal system would still want to include foreign claimants in class action lawsuits. Part III argues that deterrence, not efficiency, is the most important objective underlying the small-claim class action lawsuit and that excluding foreign claimants from classes undermines this deterrence function. Part IV explains that, in the majority of cases, foreign claimants do not really jeopardize efficiency or procedural fairness, as the ability to relitigate the same case in a foreign court, while theoretically possible, is not practically realistic. In those cases, the courts must grant foreigners access to federal class action lawsuits, as this is the only way that the class action can deter corporate misconduct and preserve investor confidence in the marketplace, two core objectives of the class action.

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<sup>26</sup> See *supra* notes 15–23 and accompanying text.

<sup>27</sup> See, e.g., *Empagran S.A. v. F. Hoffman-LaRouche, Ltd.*, 315 F.3d 338, 341 (D.C. Cir. 2003), *vacated*, 542 U.S. 155 (2004); *Krangel v. Golden Rule Res., Ltd.*, 194 F.R.D. 501, 506 (E.D. Pa. 2000) (certifying settlement class consisting of Canadian investors); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 CIV. 1262, 1998 WL 50211 (S.D.N.Y. Feb. 6, 1998) (permitting foreign claimants to remain in class despite increased burdens of notice); *In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24, 50–51 (S.D. Cal. 1975) (permitting foreign debenture holders to remain in class despite risk that foreign countries might not recognize res judicata effect of U.S. judgment).

## I

## CLASS ACTION LAWSUITS IN THE UNITED STATES

The class action lawsuit is a “nontraditional”<sup>28</sup> litigation device that permits a representative to bring suit on behalf of a larger number of similarly situated claimants.<sup>29</sup> The representative, whose claims must be “typical” of the class as a whole,<sup>30</sup> acts as a traditional plaintiff and has a fiduciary duty to guard the interests of the entire class.<sup>31</sup> The absent class members have little responsibility while the action is pending.<sup>32</sup> Once the action settles or a trial court renders a final decision, all class members are bound by the judgment.<sup>33</sup> This consolidation is an important element of the class action, providing both the already overtaxed courts and the corporate defendants the opportunity to resolve multiple identical (or substantially similar) claims in one complex action. This obviates the need to present the same evidence and experts in multiple suits and gives defendants the finality of knowing that new claims will not arise in the future, thereby allowing defendants to plan their corporate finances without the threat of future monetary judgments.

## A. The Class Certification Process

Claimants may not bring a class action lawsuit as of right simply because jurisdiction exists and the number of potential class members is large. In an effort to minimize abuse of the class action device, the courts heavily manage class action lawsuits. A judge must certify a class before the action may proceed to litigation.<sup>34</sup> Shortly after filing the complaint, class counsel must file a motion for class certification (“class motion”).<sup>35</sup> In the class motion, class counsel does not need to

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<sup>28</sup> The U.S. Supreme Court has described the class action device as a “nontraditional form of litigation,” *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 402 (1980), in the sense that the class action is a creation of equity, rather than law. See I NEWBERG & CONTE, *supra* note 1, § 1.09, at 1-22 to 1-24.

<sup>29</sup> See FED. R. CIV. P. 23(a)(2).

<sup>30</sup> FED. R. CIV. P. 23(a)(3).

<sup>31</sup> For a discussion of the class representative, see ROSSMAN & EDELMAN, *supra* note 5, § 1.2 and FED. JUDICIAL CTR., *MANUAL FOR COMPLEX LITIGATION (THIRD)* § 30 (1995).

<sup>32</sup> See *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552 (1974) (“[P]otential class members are mere passive beneficiaries of the action brought in their behalf.”); I NEWBERG & CONTE, *supra* note 1, § 1.03, at 1-8 to 1-12.

<sup>33</sup> FED. R. CIV. P. 23(c).

<sup>34</sup> FED. R. CIV. P. 23(c)(1)(a). For a detailed discussion of the certification process, see Markham R. Leventhal, *Class Actions: Fundamentals of Certification Analysis*, FLA. B.J., May 1998, at 10.

<sup>35</sup> See ROSSMAN & EDELMAN, *supra* note 5, § 9.1.1, at 103 (“The plaintiff should file the motion requesting the court to certify the case as a class action as early in the litigation as possible.”); WILLGING ET AL., *supra* note 6, at 8 (“Counsel filed motions to certify . . . in the four districts within median times of 3.1 months to 4.3 months after the filing of the complaint.”).



address the merits of the action,<sup>36</sup> but must establish that “plaintiffs’ allegations, if assumed to be true and to state a valid cause of action, are suitable for class treatment and resolution.”<sup>37</sup>

The class motion must prove that the class meets all of the requirements laid out in Rule 23.<sup>38</sup> This is a two-step process. First, lead plaintiffs must demonstrate that the class meets four procedural prerequisites:<sup>39</sup> (1) the number of potential claimants must be so large that joinder is impracticable;<sup>40</sup> (2) there must be common questions of law or fact shared between all members of the class;<sup>41</sup> (3) the claims of the lead plaintiffs must be “typical” of the class as a whole;<sup>42</sup> and (4) the representation of absent class members by lead plaintiffs and class counsel must be “fair[ ] and adequate[ ].”<sup>43</sup>

Once plaintiffs establish these four prerequisites, plaintiffs move to the second prong of the certification test: proving that the class conforms to one of the categories listed in Rule 23(b).<sup>44</sup> Most class

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<sup>36</sup> See ROSSMAN & EDELMAN, *supra* note 5, § 9.1.3.1, at 104.

<sup>37</sup> *Id.*

<sup>38</sup> See *id.* § 9.1.5, at 106.

<sup>39</sup> FED. R. CIV. P. 23(a). For discussions on the four procedural prerequisites laid out in Rule 23, see JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 16.2 (2d ed. 1993) and Leventhal, *supra* note 34, at 12–14.

<sup>40</sup> FED. R. CIV. P. 23(a)(1). When it is possible for all claimants to sue individually, and therefore to have control over the action and the opportunity to settle, joinder is more desirable than a class action. See, e.g., CL-Alexanders Laing & Cruickshank v. Goldfeld, 127 F.R.D. 454, 455 (S.D.N.Y. 1989) (“Although no particular number define [sic] the point at which a class action is deemed conclusively inappropriate, a small class militates against certification.” (citation omitted)). Only when joinder is impracticable is a class action lawsuit appropriate. See I NEWBERG & CONTE, *supra* note 1, § 3.01, at 3-4.

<sup>41</sup> FED. R. CIV. P. 23(a)(2). When the claimants have suffered different injuries or have been injured as a result of separate, unrelated acts, a class action is not appropriate, even if the claimants were all injured by the same defendant. For this reason, the 1966 Advisory Committee’s Note suggests that the class action mechanism may not be appropriate in the mass tort context, since individual claimants suffer different injuries with different damages. See FED. R. CIV. P. 23(b)(3) advisory committee’s note. Despite this warning, the class action lawsuit has become a popular device for litigating mass tort cases. In the securities context, courts have held that the “questions of misrepresentation, materiality and scienter” that all securities claimants share against the defendants are sufficient to satisfy Rule 23(a)(2). See, e.g., *In re DaimlerChrysler AG Sec. Litig.*, 216 F.R.D. 291, 296 (D. Del. 2003) (quoting *Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 372 (D. Del. 1990)). In antitrust classes, courts have found price discrimination and the impact of the conduct upon competition to be common questions. See Alfred P. Murrah, *Historical Overview and Perspective on Class Actions*, in CLASS ACTIONS 9, 30 (Practicing Law Institute ed., 1973).

<sup>42</sup> FED. R. CIV. P. 23(a)(3).

<sup>43</sup> FED. R. CIV. P. 23(a)(4). Binding absent class members to a final judgment when lead plaintiffs or class counsel did not adequately represent them in the action would violate due process. See I NEWBERG & CONTE, *supra* note 1, § 3.21, at 3-125. Before proceeding to litigation, then, it is important that the court ensure that the “interests of the named plaintiffs are aligned with the absent members of the class, so as to ensure that the absent members of the class will be fairly represented in the litigation.” *In re DaimlerChrysler*, 216 F.R.D. at 298.

<sup>44</sup> FED. R. CIV. P. 23(b) reads as follows:

action lawsuits filed in federal district courts seeking monetary damages are Rule 23(b)(3) actions.<sup>45</sup> Rule 23(b)(3) applies to cases in which a class action is not absolutely necessary, but would “achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”<sup>46</sup> The majority of securities, antitrust, and consumer actions fall into this category.

To warrant Rule 23(b)(3) certification, plaintiffs’ counsel must prove both that the questions common to the class as a whole predominate over any questions affecting only individual members and that the class mechanism is superior to other methods for bringing suit.<sup>47</sup> In the context of securities, antitrust, and consumer actions, proving that the “questions of law or fact common to the members of the class predominate”<sup>48</sup> is generally routine, since the claims usually arise from a single act or course of action—such as fraud or price-fixing—that affects all claimants in a similar manner.

Class counsel often has greater difficulty proving that the class device is superior to other possible methods of suit. “Superiority” is a balancing test. Judges must weigh a number of factors, including the interests of individual class members in controlling the litigation, the extent and nature of any related litigation already pending in other courts, the desirability of concentrating the litigation in the particular forum, and the difficulties of managing the particular class.<sup>49</sup> If the sum of these factors weighs against class treatment, the judge should

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An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

<sup>45</sup> WILLGING ET AL., *supra* note 6, at 8 (noting that “[t]he most frequently certified class was the Rule 23(b)(3) or ‘opt-out class,’ which occurred in roughly 50% to 85% of the certified classes”).

<sup>46</sup> FED. R. CIV. P. 23(b)(3) & advisory committee’s note (1966).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

deny certification.<sup>50</sup> It is the responsibility of each individual judge to weigh the many Rule 23 requirements and decide whether to certify the class.<sup>51</sup> While the courts have long advocated liberal certification,<sup>52</sup> judges who are less enamored of the class action device often deny certification without much attempt to balance the Rule 23 requirements.<sup>53</sup>

## B. Notice and the “Opt-Out” Requirement

### 1. Adequate Notice

Once a judge certifies a class, the class representatives must identify all potential class members and provide them with notice of the pending action.<sup>54</sup> Following the *Mullane v. Central Hanover Bank & Trust Co.*<sup>55</sup> standard, notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pending action and afford them an opportunity to present their objections.”<sup>56</sup> In the class action context, this means that plaintiffs must send actual, individual notice to all reasonably identifiable class members.<sup>57</sup> When class counsel cannot identify certain class members through reasonable effort, constructive, rather than actual, notice is acceptable.<sup>58</sup> While the exact contours of constructive notice are not outlined in Rule 23, most courts have held that an advertisement in a widely circulated newspaper or magazine, which notifies readers of the pending

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<sup>50</sup> See, e.g., *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 127 F.R.D. 454, 460 (S.D.N.Y. 1989) (“[T]he combination of these problems, no one of which standing alone would necessarily require denial of certification, virtually mandates rejection of the class action form here.”).

<sup>51</sup> FED. R. CIV. P. 23(c)(1); see also 2 NEWBERG & CONTE, *supra* note 1, § 7.04, at 7-18 (“Trial courts, at least in the federal system, are now taking an increased management role in class litigation.”).

<sup>52</sup> See, e.g., *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 563 (2d Cir. 1968); *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968).

<sup>53</sup> See, e.g., *In re DaimlerChrysler AG Sec. Litig.*, 216 F.R.D. 291 (D. Del. 2003).

<sup>54</sup> See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (establishing that lead plaintiffs must absorb the initial costs of providing notice to the entire class). Because most class action lawsuits operate on a contingent fee basis, class counsel identifies the class members and absorbs all the costs of mailing or publishing notice. See FED. R. CIV. P. 23(c)(2)(B); 2 NEWBERG & CONTE, *supra* note 1, § 8.01, at 8-3.

<sup>55</sup> 339 U.S. 306 (1950).

<sup>56</sup> *Id.* at 314.

<sup>57</sup> FED. R. CIV. P. 23(c)(2)(B) (“For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”); see also *Carlisle & Jacquelin*, 417 U.S. at 173 (“Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.”).

<sup>58</sup> See FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION (SECOND) § 30.211 (1985) (asserting that “[r]eceipt of actual notice by all class members is required neither by Rule 23 nor the Constitution” and that “notice should be mailed to the last known addresses of those who can be identified and publication used to notify others”).

action and their possible involvement in it, constitutes adequate notice.<sup>59</sup>

The certifying judge must determine the proper form of notice to the class.<sup>60</sup> In the order certifying the class, the judge lays out how the class representatives must provide individualized notice to identifiable class members, in which newspapers they must publish notice of the action to reach unidentifiable class members, whether notice in additional forms of media—such as radio—is also necessary, and the number of times class counsel must publish the notice.<sup>61</sup>

Any form of notice deemed necessary by the certifying judge must conform to the requirements of Rule 23(c)(2)(B).<sup>62</sup> According to Rule 23(c)(2)(B), notice must inform the class member of the nature of the action, the definition of the class, the claims alleged, and the class member's right to appear in, or be excluded from, the action.<sup>63</sup> The notice must also state, "in plain, easily understood language,"<sup>64</sup> the binding effect of the class judgment.

## 2. *Opting Out*

If a class member does not affirmatively opt out of the action after receiving adequate notice, the class member will be bound by the final judgment.<sup>65</sup> The opt-out procedure attempts to create procedural fairness for both potential class members and the defendants forced to defend complex class action lawsuits. On the one hand, due process requires that a potential litigant have some opportunity to opt out of a lawsuit before being bound by the final settlement or judgment. On the other hand, allowing class members to sue again in another court whenever the class settlement or judgment is not satisfactory to the class member would be fundamentally unfair to defendants, who would be forced to defend large, complex class lawsuits without even the hope of finality in return. The opt-out provision of Rule 23 strikes a compromise, ensuring that potential claimants have

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<sup>59</sup> See, e.g., *Krangel v. Golden Rule Res., Ltd.*, 194 F.R.D. 501, 505 (E.D. Pa. 2000) (finding that "summary notice in *The Wall Street Journal* and *The Globe and Mail* was the best means practicable to notify [unidentifiable] class members"); *In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24, 47 (S.D. Cal. 1975) (stating that class members would get adequate notification if notice is published "in secular and financial newspapers and magazines of wide circulation . . . in appropriate foreign languages").

<sup>60</sup> FED. R. CIV. P. 23(c)(2)(B); see 2 NEWBERG & CONTE, *supra* note 1, § 8.02, at 8-4 to 8-5 ("The rule was fashioned from the premise that courts must be allowed flexibility in deciding what constitutes adequate notice . . . . While the language of the rule itself makes notice mandatory in a Rule 23(b)(3) damages suit, the nature and extent of how that mandate is to be carried out are not predetermined in the rule.")

<sup>61</sup> See, e.g., *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 983 (2d Cir. 1975).

<sup>62</sup> FED. R. CIV. P. 23(c)(2)(B).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See FED. R. CIV. P. 23(c)(3).

an opportunity to opt out of the class action lawsuit at an early stage, but also ensuring that all claimants who do not opt out by a certain date cannot later relitigate the same issues because they are bound to the final result of the class litigation.

Few potential class members opt out of class action lawsuits.<sup>66</sup> One reason for this may be the lack of a better alternative for litigating claims. There is little incentive for a claimant to opt out of a class action lawsuit when the claimant's damages are too small to justify an independent suit. Another potential explanation is human psychology. Research suggests that people are much more likely to consent to a procedure "when consent is measured *passively*, by failure to file an objection, rather than *actively*, by explicitly registering agreement to participate."<sup>67</sup> This lack of incentive to opt out is increased by the fact that absent class members have no responsibilities while the action is pending, so the burdens of remaining in the lawsuit are relatively low.<sup>68</sup>

### 3. *Opting In*

Scholars and practitioners disagree on whether Rule 23 requires that judges use the opt-out procedure.<sup>69</sup> Some scholars argue that even though Rule 23 privileges the opt-out procedure, it permits judges to certify classes under an opt-in procedure in special circumstances. In *In re U.S. Financial Securities Litigation*, the court observed that "the majority of the judiciary and the legal commentators believe that Rule 23 only provides for an 'opt-out' procedure and, therefore, advocate its use solely."<sup>70</sup> The court then goes on to assert, however, that the "history and the language of Rule 23 and recent decisions thereto permit the establishment of an 'opt-in' class," and to list a number of post-1966 cases that utilized the opt-in procedure.<sup>71</sup>

The availability of the opt-in procedure takes on added significance when a class contains a large number of foreign class members. Under an opt-in procedure, the judge would give direct notice to all class members, informing them that they could not share in the final judgment "unless they transmit to the Court a specific request for inclusion."<sup>72</sup> By opting in to the action, class members would be "af-

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<sup>66</sup> WILLGING ET AL., *supra* note 6, at 10 ("Across all four districts, the median percentage of members who opted out of a settlement was either 0.1% or 0.2% of the total membership of the class.")

<sup>67</sup> HENSLER ET AL., *supra* note 2, at 38 n.22.

<sup>68</sup> See *supra* note 32.

<sup>69</sup> See *In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24, 53 (S.D. Cal. 1975).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 53-54.

<sup>72</sup> CL-Alexanders Laing & Cruickshank v. Goldfeld, 127 F.R.D. 454, 459 (S.D.N.Y. 1989).

firmatively agreeing to be bound and voluntarily subjecting themselves to the jurisdiction of the Court for such purposes.”<sup>73</sup> At least one commentator actively advocates the use of opt-in classes as a way to avoid the potential problems of jurisdiction and notice that may arise when foreign claimants attempt to join class action lawsuits.<sup>74</sup>

Still, “opt-in” classes have serious drawbacks. First, the opt-in procedure can be rather inefficient. Under an opt-in procedure, the courts are forced to monitor the class more closely, since the size and contours of the class constantly change as potential class members continue to opt in to the class, and class counsel is forced to process hundreds, perhaps even thousands, of opt-in forms.

Second, opt-in classes make it difficult for defendants to plan a litigation strategy, since they do not know until rather late in the process how many potential class members will actually opt in to the action. This inability to plan deters settlement, which can be highly desirable in the context of complex class litigation. Thus, if not used properly, the opt-in procedure can become a serious administrative nightmare for both the courts and the parties. If this occurs, the courts would simply be trading one inefficiency—the risk that foreign class members will not be bound—for another—the opt-in procedure.

Third, opt-in classes may undermine the deterrent function of the class device. As one Canadian legal scholar recently observed:

Requiring the members of a plaintiff class to opt-in to the class . . . necessarily results in a class that is comprised of far fewer members than it might otherwise contain.

. . . [T]o the extent that class actions are intended to have a regulatory effect by requiring market actors to internalize the costs of wrongful conduct, under-inclusive plaintiff classes mean that the costs internalized are less than the costs generated by the wrongful conduct.<sup>75</sup>

By diminishing the number of potential plaintiffs in the class, the opt-in device may weaken the ability of class action lawsuits to deter the corporate wrongdoer’s conduct. In this sense, the opt-in class is the worst of both worlds: It creates added administrative burdens for both the parties’ attorneys and the judge, which undermines the efficiency function of the class action. At the same time, the opt-in class makes it easier for corporations to absorb the legal costs of their wrongful behavior, which undermines the deterrent function of the class action.

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<sup>73</sup> *Id.*

<sup>74</sup> See Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 *FORDHAM L. REV.* 41, 85–89 (2003).

<sup>75</sup> Janet Walker, *Crossborder Class Actions: A View from Across the Border*, 2004 *MICH. ST. L. REV.* 755, 770.

In short, while the opt-in class may be desirable in special circumstances, it is not appropriate as a default state any time foreign claimants are involved in a U.S. class action lawsuit. If, however, if the judge must choose between denying all foreign claimants access to the class or certifying foreign claimants under an opt-in class in order to solve potential jurisdictional concerns, the opt-in class is the more desirable of these options because the opt-in class gives foreign claimants to opportunity to obtain redress.

## II

### COMPLICATING COMPLEX LITIGATION: THE PROCEDURAL DIFFICULTIES INTRODUCED BY FOREIGN CLAIMANTS

Upon a motion for class certification, a district judge must balance the right of the claimants to avail themselves of the class action mechanism against the administrative burdens that the class action lawsuit will impose on the defendants and the courts.<sup>76</sup> Foreign class members add additional burdens to both defendants and courts. First, while the preclusive effect of a U.S. class judgment in the courts of another U.S. state is clear, the preclusive effect of the same judgment in the courts of a foreign country is not. Second, though of lesser concern than the first, sending notice abroad may be challenging, particularly when not all class members are explicitly identified. Because adequate notice is a requirement for due process, a foreign class member who has not received proper notice cannot be bound by the class settlement or judgment.<sup>77</sup> So, for two distinct—though clearly interrelated—reasons, foreign claimants jeopardize the binding nature of the class device. Many judges consider the res judicata and notice problems introduced by foreign claimants to be valid reasons for denying class certification to foreign claimants.

#### A. Res Judicata Effect of U.S. Judgments in Foreign Courts

The biggest problem with permitting foreign claimants to join class action lawsuits is the dubious status of U.S. judgments in foreign courts. The Full Faith and Credit Clause of the U.S. Constitution requires all U.S. state courts to recognize and enforce a valid judgment rendered by the courts of a sister state.<sup>78</sup> This ensures that plaintiffs cannot sue successively in different forums to achieve the most desirable outcome, wasting judicial and party resources relitigating on the same set of facts. Unfortunately, there is no treaty equivalent of the

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<sup>76</sup> This is the purpose of the “superiority” inquiry incorporated into Rule 23. *See* FED. R. CIV. P. 23(b)(3).

<sup>77</sup> *See* *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15 (1950) (setting the generally recognized due process standard for notice in U.S. courts).

<sup>78</sup> U.S. CONST. art. IV, § 1.

Full Faith and Credit Clause that guarantees the recognition and enforcement of U.S. judgments in foreign countries.<sup>79</sup> While U.S. courts routinely enforce the judgments of foreign nations as a matter of comity,<sup>80</sup> few foreign courts automatically recognize or enforce U.S. judgments.<sup>81</sup> Instead, most foreign courts are skeptical of U.S. judgments, reviewing them carefully and frequently denying enforcement of these judgments on “public policy” grounds.<sup>82</sup> Therefore, while a class judgment may preclude absent class members from suing again in another U.S. court, the same judgment likely would not preclude absent foreign class members from suing again in the courts of their home countries.<sup>83</sup>

The United States has attempted to negotiate judgment-recognition treaties on numerous occasions.<sup>84</sup> These attempts have failed for a number of reasons. First, the large punitive and treble damage awards granted in U.S. courts offend foreign notions of public policy.<sup>85</sup> Most civil-law countries believe that it is the role of the government, not private litigants, to regulate conduct, and that private lawsuits exist primarily to compensate victims for their losses. The United States subscribes to a different philosophy, believing instead that the threat of large civil damages in suits by private litigants is an effective way to deter illegal conduct.<sup>86</sup> True to this philosophy, U.S.

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<sup>79</sup> See Russell J. Weintraub, *How Substantial is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167, 167–68 (1998).

<sup>80</sup> In *Hilton v. Guyot*, 159 U.S. 113 (1895), the U.S. Supreme Court held that “comity of nations” requires U.S. courts to recognize and enforce foreign judgments. This case is still good law, setting a generous recognition standard in the United States. Section 481(1) of the Restatement (Third) of Foreign Relations Law, which reflects the existing standard for the recognition of foreign judgments in U.S. courts, states: “[A] final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481(1) (1987). For a thorough discussion on the status of foreign judgments in U.S. courts, see Weintraub, *supra* note 79, at 173–78.

<sup>81</sup> See Weintraub, *supra* note 79, at 179–84; see also *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 997 (2d Cir. 1975) (“European courts are far less inclined to recognize foreign judgments than are American courts . . .”).

<sup>82</sup> See Weintraub, *supra* note 79, at 179–84.

<sup>83</sup> See *id.* However, Weintraub notes that “recognition of foreign money judgments is common and recent changes have accelerated the trend towards recognition.” *Id.* at 178–79.

<sup>84</sup> See *id.* at 168–69 (discussing some of the failed attempts at negotiating a judgments convention); John C.L. Dixon, *The Res Judicata Effect in England of a US Class Action Settlement*, 46 INT'L & COMP. L.Q. 134, 138 (1997) (noting numerous attempts to establish a reciprocal judgment enforcement treaty between the United States and the United Kingdom).

<sup>85</sup> See Weintraub, *supra* note 79, at 182–83 (discussing other countries’ dislike of punitive and multiple damages).

<sup>86</sup> See, e.g., Mark A. Klugheit, “Where the Rubber Meets the Road”: *Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*, 52 SYRACUSE L. REV. 803, 805 (2002)



courts permit plaintiffs to sue for damages in excess of the their actual losses in many types of suits.<sup>87</sup> Because courts in most other countries do not agree with the use of private litigation to punish and deter rather than to compensate, they permit private plaintiffs to recover only actual, compensatory damages and will not enforce a U.S. judgment that permits punitive damages.<sup>88</sup> Second, U.S. courts assert, or refuse to assert, jurisdiction over parties on different grounds than most civil-law courts.<sup>89</sup> If a U.S. court exercises jurisdiction over a party based on a form of jurisdiction foreign to the law of the enforcing country, the foreign court often will refuse to enforce the judgment.<sup>90</sup> Finally, courts are often wary about enforcing foreign judgments based upon public law subjects, such as securities or anti-trust. When the public law of the judgment-issuing country differs from the public law of the judgment-enforcing country,<sup>91</sup> enforcing a judgment based upon U.S. public law interferes with the sovereign right of the enforcing country to decide what conduct to regulate within its own borders.<sup>92</sup>

All of these concerns have impeded efforts to enact a foreign judgment-recognition treaty between the United States and other countries. These concerns are only magnified in the context of class action lawsuits, in which the aggregate damage awards are large, the bases for exercising jurisdiction over absent class members are often tenuous, and the subject matter of the suit often touches upon areas of public law.

In addition, most foreign countries disapprove of the U.S. class action device,<sup>93</sup> which amplifies the risk that foreign courts will deny

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(discussing the use of punitive damages to further social goals, particularly deterrence of similar conduct in the future).

<sup>87</sup> For example, plaintiffs bringing tort or consumer protection actions under the Fair Credit Reporting Act may sue for punitive damages, *see* Fair Credit Reporting Act of 1968, 15 U.S.C. § 1681 (2000), and plaintiffs bringing federal antitrust actions are entitled to treble damages, *see* Clayton Antitrust Act, 15 U.S.C. § 15 (2000).

<sup>88</sup> *See* Weintraub, *supra* note 79, at 182–83.

<sup>89</sup> *See* Campbell McLachlan, *Transnational Tort Litigation: An Overview*, in *TRANSNATIONAL TORT LITIGATION: JURISDICTIONAL PRINCIPLES* 1, 16 (Campbell McLachlan & Peter Nygh eds., 1996); Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 19–25 (1996).

<sup>90</sup> *See, e.g.*, Weintraub, *supra* note 79, at 180–84.

<sup>91</sup> *See* William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161 (2002).

<sup>92</sup> *See id.* at 183 (“[I]t is an infringement of ‘sovereignty and, accordingly, public international law’ for one state ‘to invoke its sovereign rights within the territory’ of another.” (quoting F.A. Mann, *The International Enforcement of Public Rights*, 19 N.Y.U. J. INT’L L. & POL. 603, 608 (1987))).

<sup>93</sup> *See* Sherman, *supra* note 3, at 403 (“[M]ost other countries view American class actions as a Pandora’s box that they want to avoid opening.”); *see also* Order of the German Federal Constitutional Court (Bundesverfassungsgericht) of 25 July 2003, 2 BVR 1198/03 (denying service of process of complaint in a U.S. class action lawsuit against global media publisher Bertelsmann AG in Germany on the ground that the U.S. class action lawsuit,

preclusive effect to U.S. class action judgments. The greatest point of contention is the opt-out procedure, which, as previously discussed, binds an absent class member to a settlement or final judgment unless the individual affirmatively opts out of the action after receiving notice.<sup>94</sup> While the notice sent to potential class members must warn them that “unless they mail in an ‘opt-out’ form, they will be bound by the results of the litigation,”<sup>95</sup> notice may be constructive rather than actual.<sup>96</sup> Therefore, “in many . . . class actions where there are insufficient records of purchase,” a large number of class members receive notice “through publication in newspapers, periodicals, radio, television, or through posting in places calculated to be seen by class members.”<sup>97</sup> The idea that courts can bind a claimant to a legal judgment based upon inaction, particularly when the claimant received notice of the action only through constructive means, is difficult for foreign courts to accept.<sup>98</sup>

Additionally, most other countries believe that the opt-out procedure is a violation of the rights of absent class members.<sup>99</sup> In some countries, if an absent class member did not receive actual notice of the pending action, the foreign court will not recognize the resulting

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which threatened up to \$17 billion in punitive damages, violated Bertelsmann’s rights under the German constitution); Bettina Friedrich, *Federal Constitutional Court Grants Interim Legal Protection Against Service of a Writ of Punitive Damages Suit*, 4 GERMAN L.J. 1233 (2003) (analyzing German Constitutional Court’s decision to deny service of process in the Bertelsmann case and suggesting that German law’s suspicion of class action lawsuits and punitive damages led to this outcome); Drew Cullen, *German Court Blocks \$17bn Bertelsmann Suit*, REG., July 28, 2003 (discussing the German Constitutional Court decision halting service of process upon Bertelsmann on the ground that use of the class action device against Bertelsmann was abusive), at [www.theregister.co.uk/2003/07/28/german\\_court\\_blocks\\_17bn\\_bertelsmann](http://www.theregister.co.uk/2003/07/28/german_court_blocks_17bn_bertelsmann) (last visited June 26, 2005); Anthony Sebok, *The Napster Saga Continues*, Dec. 2003, available at <http://practice.findlaw.com/napster-1203.html> (last visited June 26, 2005) (same).

<sup>94</sup> See Sherman, *supra* note 3, at 410.

<sup>95</sup> *Id.*

<sup>96</sup> See discussion *supra* Part I.B.1.

<sup>97</sup> Sherman, *supra* note 3, at 410.

<sup>98</sup> Many U.S. legal scholars also had trouble with the idea of binding absent class members, especially those who received only constructive notice, when Federal Rule of Civil Procedure 23 was first amended in 1966. See Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 45 (1967) (

To a generation raised on *Pennoy v. Neff*, it is a rather heady and disturbing idea to be told that people in faraway places who receive a letter or are “described” in a newspaper “notice” which does not come to their attention are exposed to a binding judgment unless they take some affirmative action to exclude themselves.

(citation omitted)).

<sup>99</sup> Cf. Sherman, *supra* note 3, at 418–32 (describing group litigation devices in other countries, of which only Australia and Canada permit opt-out procedures, thereby suggesting that the opt-out procedure does not comport with notions of due process in many other countries).

class judgment against that class member.<sup>100</sup> In other countries, the opt-out procedure is so offensive that the courts will not recognize a U.S. judgment against a class member even if the class member received actual, in-hand notice, and therefore a valid opportunity to opt out of the action.<sup>101</sup> Foreign practitioners from all over the globe have submitted affidavits in U.S. courts attesting to the fact that courts of their home countries “would not recognize a United States judgment in favor of the defendant as a bar to an action by their own citizens.”<sup>102</sup> A U.S. class action judgment in favor of plaintiffs would suffer the same fate in foreign courts, so a foreign class member might be able to sue again in a foreign court if the amount of the U.S. settlement or final judgment did not meet the class member’s fancy.<sup>103</sup>

The binding nature of the class action is one of its greatest attractions. If class members could sue again whenever they were not satisfied with the final settlement or judgment, then a class action would be little more than a permissive joinder device, and there would be little reason for judges to bear the added responsibilities of certification, notice, and general case management that a class action imposes. It is the promise of consistency and finality, which is possible only because all class members are bound to the final judgment, that tips the scales in favor of certifying a class despite these added procedural burdens. Without consistency and finality, the class action loses its force. For this reason, some judges are not willing to certify classes

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<sup>100</sup> See, e.g., Dixon, *supra* note 84, at 150 (suggesting that a class member must receive “notice of the action and the chance to withdraw or object” before a British court will recognize a U.S. judgment against him).

<sup>101</sup> See, e.g., *In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24, 48 (S.D. Cal. 1975) (suggesting that a class member who had not actually opted in or participated in the action would not be bound by a U.S. judgment against him in the courts of his home country).

<sup>102</sup> *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996–97 (2d Cir. 1975). In this case, the record contained affidavits from practitioners in the United Kingdom, the Federal Republic of Germany, Switzerland, Italy, and France. *Id.* at 996; see also *In re Lloyd’s Am. Trust Fund Litig.*, No. 96 CIV 1262, 1998 WL 50211, at \*15 n.7 (S.D.N.Y. Feb. 6, 1998) (

[M]any, if not all of the foreign [class members] could sue Citibank a second time in their home jurisdictions on the very same claims, even if they are unsuccessful here. The law surveyed includes five jurisdictions, which are France, England, South Africa, Canada, and Switzerland, and which represent approximately 58 percent of the proposed class.

); *Del Fierro v. PepsiCo Int’l*, 897 F. Supp. 59, 64 (E.D.N.Y. 1995) (suggesting that the Philippines would not accord preclusive effect to a U.S. class action judgment); *In re U.S. Fin. Sec. Litig.*, 69 F.R.D. at 48–49 (observing that, according to affidavits by attorneys from France, West Germany, Luxembourg, Norway, the United Kingdom, Belgium, Switzerland, and Italy, a class member who had not affirmatively opted in or participated in the action would not be bound by the U.S. judgment in the courts of the class member’s home country).

<sup>103</sup> See, e.g., *In re Lloyd’s*, 1998 WL 50211, at \*15 (“[Defendant] contends, even if the plaintiffs were to win he could relitigate in his home court in hopes of a more generous recovery there, thereby taking ‘two bites of the apple.’”).

that include foreign claimants as long as the risk remains that foreign class members will sue again in foreign courts.

### B. Problems of Sending Adequate Notice to Foreign Claimants

Certifying a class containing large numbers of foreign claimants also raises issues of notice. As discussed above,<sup>104</sup> before a court may bind a Rule 23(b)(3) class member to a settlement or final judgment, the class member must receive notice of the pending action.<sup>105</sup> Due process requires that notice be reasonably calculated to give the class member the opportunity to be heard.<sup>106</sup> This means that notice must not only inform the class member of the pending action, including the action's nature and scope, but must also inform the class member of her right to make a showing in the action and of the need to affirmatively opt out of the action in order not to be bound by the judgment.<sup>107</sup>

The certifying judge is responsible for determining what constitutes adequate notice according to the facts of the particular case.<sup>108</sup> When all the potential class members are U.S. citizens, judges may rely upon their own knowledge of the language and available print media to determine what adequate notice entails. When their own experience fails them, judges have at their disposal decades of case law on adequate notice to inform them of what other judges have done in the past. When many of the potential class members live outside of the United States, determining what constitutes adequate notice is more complicated. Linguistic and cultural barriers make it more difficult to "communicate effectively to [foreign] claimants their rights and options."<sup>109</sup> If the judge is not familiar with the language, customs, literacy levels, or print-media sources of the foreign countries in which the potential class members reside, it is virtually impossible to draft an order identifying the "best notice practicable under the circumstances."<sup>110</sup> If the foreign class members do not receive adequate notice, they cannot be bound to the class settlement or final judgment, because binding them without proper notice would violate

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<sup>104</sup> See *supra* Part I.B.1.

<sup>105</sup> FED. R. CIV. P. 23(c)(2)(B).

<sup>106</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

<sup>107</sup> See discussion *supra* Part I.B.1.

<sup>108</sup> See discussion *supra* Part I.B.1.

<sup>109</sup> Bassett, *supra* note 74, at 64 (quoting Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum v. Shutts*, 96 YALE L.J. 1, 22 (1986)). For a general discussion of the problems of sending notice to foreigners, see *id.* at 64–66.

<sup>110</sup> FED. R. CIV. P. 23(c)(2)(B); see also *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996 n.47 (2d Cir. 1975) (observing that the fact that notice was sent to foreign class members only in English could be problematic).

their due process rights.<sup>111</sup> As a result, all costs expended notifying the foreign claimants and keeping them apprised of the action would be wasted and the finality of the class action would be destroyed. To avoid such a result, the judge must learn the complexities of notice in various foreign nations, a burdensome task that wastes precious judicial resources.<sup>112</sup>

The burden of providing adequate notice in multiple countries and in multiple languages may also drive up the costs of providing notice to the class. Since class counsel must absorb the costs of class notice, this might deter plaintiffs' lawyers from taking on cases containing large numbers of foreign claimants.

### III

#### EFFICIENCY VERSUS DETERRENCE: THE OBJECTIVES OF SMALL-CLAIM CLASS ACTIONS

If efficiency was the only benefit arising from the use of the class device, the increased risk that foreign claimants could sue again in foreign courts and the increased burden of sending adequate notice abroad would certainly weigh in favor of excluding foreign claimants from class action lawsuits. But efficiency is not the only benefit that the class action lawsuit offers to litigants or to society as a whole. Deterrence of corporate wrongdoing is another major reason for permitting class action lawsuits. In order to understand why federal judges should permit foreign claimants to remain in class action lawsuits despite the procedural risks that foreign claimants introduce, it is important to explore these two objectives in greater detail.

##### A. Small-Claim Class Actions are Not Efficient

In certain circumstances, class action lawsuits offer both courts and defendants some form of efficiency. By combining all claims based upon the same set of facts into one action, a class action frees the courts from hearing a multiplicity of suits.<sup>113</sup> It also frees defendants from the expense of presenting the same evidence and experts multiple times in successive suits.<sup>114</sup> In addition, because all class members who have not affirmatively opted out of the lawsuit are bound by the final judgment, the class action minimizes the risk of inconsistent judgments<sup>115</sup>—which would likely result if independent suits were litigated in different courts—and gives defendants the com-

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<sup>111</sup> See *Mullane*, 339 U.S. at 314–15.

<sup>112</sup> See *Bersch*, 519 F.2d at 996 n.47 (“[I]f notice is to be sent in several languages, can the court simply delegate responsibility to insure accuracy?”).

<sup>113</sup> See 1 NEWBERG & CONTE, *supra* note 1, § 5.46, at 5-44.

<sup>114</sup> See *id.* § 5.37, at 5-44 to 5-45.

<sup>115</sup> See *id.*

fort of knowing that they will not be forced to defend an inestimable number of unanticipated lawsuits on the same set of facts in the future.<sup>116</sup> But these benefits are only relevant in cases in which individual class members' claims are large enough to warrant individual lawsuits if the class action device is not available.<sup>117</sup> This is commonly found in mass tort or environmental cases, in which the nature of the injuries and the availability of punitive damages provide an incentive for individual victims to sue.

The efficiency objective is less applicable to small-claim securities, antitrust, and consumer class actions. In these cases, the losses sustained by individual investors and consumers are rarely large enough to justify independent lawsuits, so rather than "avoid[ing] a multiplicity of actions," the class action creates litigation.<sup>118</sup> Under such circumstances, one can hardly argue that the class action lawsuit promotes efficiency. After all, from a pure efficiency standpoint, a class action certainly imposes greater burdens upon the court and upon corporate defendants than no suit at all.<sup>119</sup> But no suit at all is hardly a desirable result. It is important for victims of corporate wrongdoing to obtain compensation. It is also important that corporate wrongdoers be held accountable for their actions, which would not be the case if victims had no cost-effective vehicle through which to bring suit. This is the "enabling objective" of the class action mechanism, because it enables lawsuits that would otherwise be priced out of the U.S. courts due to the exorbitant costs of litigation.<sup>120</sup>

## B. Small-Claim Class Actions Enable Necessary Litigation

### 1. *Giving Victims Their Day in Court*

Perhaps the most basic objective of the class action device is to ensure that individuals with small, but legitimate, legal claims receive compensation for their injuries. It is hardly equitable or just to force the public to bear the costs of corporate misconduct. Beyond equity and justice, however, closing the courthouse doors to victims solely because their injuries are not large enough to warrant independent

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<sup>116</sup> Many scholars argue that this is a major benefit of the class device, allowing corporate defendants to plan their financial resources and encouraging settlement of the class action lawsuit. See, e.g., *id.* §§ 5.38 & 5.40, at 5-36 to 5-37, 5-37 to 5-39. Settlement, in turn, saves additional court resources by eliminating the need for a complex trial.

<sup>117</sup> See *id.* § 5.46, at 5-44.

<sup>118</sup> *Id.*

<sup>119</sup> See, e.g., Samuel M. Hill, *Small Claimant Class Actions: Deterrence and Due Process Examined*, 19 AM. J. TRIAL ADVOC. 147, 150 (1995) (observing that some commentators "question the efficiency of certifying a class action that creates litigation where, absent the class action device, none would exist due to the small size of the individual claims").

<sup>120</sup> See *supra* note 5 and accompanying text.

litigation would undermine the public's trust in the judicial system. One judge aptly observed:

It seems to me that this matter touches on the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for the adjudication of disputes involving all our citizens—including those deprived of human rights, consumers who overpay for products because of antitrust violations, and investors who are victimized by misleading information—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce, while unwilling to grant a civil remedy against a corporation, which has benefited to the extent of many millions of dollars from collusive, illegal pricing of goods.<sup>121</sup>

If individuals had no means of redress for their small claims, particularly when these claims arise from the illegal conduct of large, publicly visible corporations, many victims would lose faith in the judicial system. The judicial system can only maintain the faith and loyalty of the public if it provides effective methods of redress for all claims, not only those that meet a high monetary threshold. The class action mechanism serves this purpose, providing a cost-effective method for litigating small claims.<sup>122</sup>

If individuals had no means of redress for their small claims, they would likely lose faith in the marketplace as well. Confidence in the marketplace takes on added significance in the context of securities. Experts in the field of securities law assert that the existence of securities class actions promotes investor confidence because investors know that in the event of fraud they will be able to recoup some, if not all, of their losses.<sup>123</sup> One plaintiffs' class action lawyer goes so far as to suggest that the availability of the class action is the reason why U.S. financial markets "are deemed more attractive and secure than foreign markets, where such remedies are lacking."<sup>124</sup> As former SEC Chairman Richard Breeden warned, "[L]imitations on private securities suits . . . would erode confidence in capital markets, reduce investment, and increase the cost of capital for U.S. business."<sup>125</sup> Investor

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<sup>121</sup> Excerpts from a Symposium Before the Judicial Conference of the Fifth Circuit, 58 F.R.D. 299, 305 (1973) (comments of Judge Jack B. Weinstein), *quoted in* ROSSMAN & EDELMAN, *supra* note 5, § 1.1.1, at 3.

<sup>122</sup> *See supra* note 5 and accompanying text.

<sup>123</sup> *See* Bershad et al., *supra* note 3, at 6 (stating that the existence of securities class actions "is a major reason why investors' confidence in the financial markets in the United States has been maintained despite all the wrongdoing").

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 10. Breeden also stated:

Private suits under Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder . . . are instrumental in recompensing investors who are cheated through the issuance of false and misleading information or by other means. . . . *If this were not the case, investors would be far less willing to*

confidence is an important factor in ensuring continued investment in U.S. companies. Continued investment, in turn, is vital to keeping the economy afloat.

## 2. *Deterrence of Corporate Misconduct and Private Attorneys General*

Deterrence of corporate misconduct is the most important objective of small-claim class action lawsuits. While government agencies—namely the SEC, FTC, and DOJ—exist to regulate corporate behavior, these agencies do not have the staff or resources necessary to police all corporate misconduct.<sup>126</sup> In 1991, former SEC Chairman Richard Breeden testified before Congress that “the SEC ‘is able to prosecute only a fraction of the cases in which investors have suffered losses.’”<sup>127</sup> The DOJ and FTC, which prosecute violations of antitrust and consumer protection laws, suffer similar inadequacies. Private civil suits by victims of corporate misconduct, then, are a “‘necessary supplement’ to government enforcement.”<sup>128</sup> Without the class action mechanism, many victims of corporate wrongdoing would never be compensated for their losses, and corporations, knowing the shortcomings of the agencies policing them, would have little incentive to cease their unlawful conduct.<sup>129</sup>

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*participate in our securities markets. This would limit the most important source, and raise costs, of new capital for all American businesses.*

*Id.*; see also *id.* at 10 n.14 (

If there is a loss of public confidence in the nation’s ability to provide private as well as public enforcement remedies as a deterrent against corporate misconduct, pension fund plan managers, along with other investors, will be reluctant to invest in the stock of both new and mature corporations. This would, in turn, result in a diminution in the ability of these companies to raise the capital needed for growth, expansion, or job creation.

(quoting Lester B. Snyder & Jerry G. Gonick, *The Interrelationship of Securities Class Action Litigation and Pension Plan Tax Policy: What’s Really at Stake?*, 21 SEC. REG. L.J. 123, 146 (1993))).

<sup>126</sup> *Id.* at 9.

<sup>127</sup> *Securities Investor Protection Act of 1991: Hearing Before the Subcomm. on Securities, Senate Comm. On Banking, Housing and Urban Affairs*, 102d Cong., 1st Sess. 15–16 (1991) [hereinafter *Hearings*].

<sup>128</sup> Bershada et al., *supra* note 3, at 9; see also *Hearings*, *supra* note 127, at 5 (statement of John R. Perkins, President, North American Securities Administrators Association) (“No one—save those who have committed the fraud in the first place—benefits from . . . [a] wholesale assault on private rights of action.”), *quoted in* Bershada et al., *supra* note 3, at 10 n.11.

<sup>129</sup> Admittedly, even in the absence of regulation, some corporate executives might be deterred by moral incentives. Assuming that corporations are economically rational actors driven by profit, however, morality rarely keeps corporations from engaging in wrongdoing. One corporate executive summed up this reality rather well when he stated, “‘We think all people are honest, but they’re more honest if you watch them like a hawk.’” Mitchell Siconolfi, *Bear Sterns Prospers Hiring Daring Traders That Rival Firms Shun*, WALL ST. J., Nov. 11, 1993, at A1, *quoted in* Bershada et al., *supra* note 3, at 9.



The class action lawsuit is widely believed to be a successful deterrent against corporate misconduct.<sup>130</sup> If class action lawsuits did not exist, engaging in securities fraud, price-fixing, and other abuses would be a profitable corporate strategy. The small amounts illegally extracted from each consumer often add up to millions of dollars. Few victims would sue, and the costs of settling or litigating the claims of those who do sue would most likely be less than the profit gained as a result of the illegal practices.<sup>131</sup> The risk of a large, classwide judgment changes this calculation completely. When a corporation knows that all injured purchasers may later sue, costing the corporation not only compensatory damages but also litigation costs—and, in some cases, treble or punitive damages<sup>132</sup>—it becomes much less lucrative to engage in such illegal conduct.<sup>133</sup> In many cases, the threat of complex litigation and a large plaintiffs' judgment is sufficient to compel corporations to voluntarily comply with the law.<sup>134</sup>

Recognizing this deterrent effect, Congress has expressed a strong policy in favor of encouraging enforcement of securities, anti-trust, and consumer protection statutes through private litigation.<sup>135</sup>

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<sup>130</sup> See, e.g., HENSLER ET AL., *supra* note 2, at 4 (noting that consumer advocates and government regulators both believe that class action lawsuits “provide additional incentives for businesses to comply with regulations”); Bershad et al., *supra* note 3, at 17 (“The present system does a good job of compensating victims of securities violations; it probably does an even better, although much less visible, job of deterring such violations.”).

<sup>131</sup> See HENSLER ET AL., *supra* note 2, at 4 (“When individual losses are small, any one individual who is subject to them is unlikely to file a lawsuit against the corporation.”).

<sup>132</sup> For example, the federal antitrust laws permit claimants to recover treble damages and allow one-way fee shifting of court costs and attorneys' fees to the losing defendant. See Clayton Antitrust Act, 15 U.S.C. § 15 (2000). Many federal consumer protection laws permit punitive damages. See ROSSMAN & EDELMAN, *supra* note 5, § 2.7.2.4, at 33.

<sup>133</sup> Rossman & Edelman explain:

A company may treat small individual judgments as the cost of doing business and continue to engage in the same illegal conduct with its other customers. On the other hand, a company will take much more seriously the threat of a classwide judgment—often for statutory damages and attorney fees in excess of actual damages. Consequently, a class action may not only modify the defendant's general business behavior, but may modify that of other companies nationwide who engage in the same practice.

ROSSMAN & EDELMAN, *supra* note 5, § 1.1.1, at 4.

<sup>134</sup> See Bershad et al., *supra* note 3, at 17 (

[W]e hear repeatedly from corporate counsel for many companies that their most potent argument with their clients for dissuading conduct that would skirt the boundaries of propriety under the securities laws is to remind them of their potential personal exposure and the vigor with which class plaintiffs pursue securities actions.

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<sup>135</sup> See 1 NEWBERG & CONTE, *supra* note 1, § 5.51, at 5-48 to 5-49 (

Usually this policy has taken the form of inducements to facilitate private litigation, such as express creation of a private right of action in the federal courts without respect to the amount in controversy, authorizations for the award of counsel fees to the successful plaintiff, treble-damage awards, liquidated or statutory minimum damages, and other measures.

In essence, Congress turned citizens into enforcers of public law, or “private attorneys general,”<sup>136</sup> by creating private rights of action in the federal courts. Without the class action device, ordinary citizens would rarely bring these public law actions since the costs of litigating a lawsuit would far outweigh any potential return. By allowing claimants to pool resources, the class action lawsuit lessens the burden on individual claimants, making it more attractive to bring suits in the public interest.<sup>137</sup> In addition, through the prospect of large contingent fee awards, the class action provides attorneys with an economic incentive to take on these complex suits, “promot[ing] their interests as well as those of the public at large.”<sup>138</sup>

C. Excluding Foreign Claimants from Class Action Lawsuits  
Undermines the Deterrent Function of the Class Device

1. *Deterrence is a Global Problem*

Excluding foreign claimants from U.S. class action lawsuits, when these claimants cannot bring independent lawsuits or group actions abroad, undermines the deterrent effect of the class device. The deterrent effect of the class action only works because corporations know that if they engage in fraud, price-fixing, or some other consumer abuse, victims will band together and sue for large damages. As one legal scholar noted, “Corporate defendants despise class suits for the obvious reason that their economic risk is dramatically elevated.”<sup>139</sup> It is the economic risk created by private class litigation, not public criminal enforcement statutes, that keeps corporations from engaging in illegal behavior. If this risk is removed, then corporations no longer have an economic incentive to comply with the law.

Excluding foreign claimants from class action lawsuits removes, or at least lessens, the economic risk of engaging in illegal conduct because it removes an entire category of purchasers from the litigation system. Unfortunately, “[f]rom the perspective of deterring illegal conduct, European countries lack private procedural instruments which can generate rigorous substantive control.”<sup>140</sup> In fact, the vast majority of countries, not just European countries, lack such controls. Thus, if foreign claimants cannot sue in U.S. courts, they generally cannot sue at all. Claudio Consolo, an Italian legal scholar, gives a telling example:

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<sup>136</sup> See *supra* note 11.

<sup>137</sup> See 1 NEWBERG & CONTE, *supra* note 1, § 5.51, at 5-49.

<sup>138</sup> *Id.*

<sup>139</sup> Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 267 (1992).

<sup>140</sup> *Id.* at 267-68.

We can take the case . . . of the small investor who suffers modest damage due to the fraud or fault of company executives. Fact and reason teach us that in Italy this investor will not sue. The damage being minute makes a lawsuit impossible . . . . The rational litigant can do nothing but suffer the loss instead of increasing it by futile legal action. . . .<sup>141</sup>

In such a system, buyers have little power. Corporations know that they control the consumer relationship and therefore often engage in profit-maximizing, but abusive, conduct.

When multinational corporations know that a large portion of the globe is easy prey to their lucrative, but illegal, selling practices, there are two possible results: Either corporations adopt a two-tiered system, in which U.S. customers are treated differently from foreign customers, or corporations continue to injure both U.S. and foreign purchasers alike, calculating that the profits gained from abroad more than make up for the court fees and damages that must be paid out to U.S. purchasers. Neither scenario is good for the U.S. economy or its citizens.

In a two-tiered system, multinational corporations abide by the law when selling to U.S. consumers, but break the law when dealing with the rest of the world. Corporations continue to engage in illegal conduct, but do so beyond the reach of U.S. federal laws. In *Bersch v. Drexel Firestone, Inc.*,<sup>142</sup> for example, the district court judge noted that “[d]efendants obviously took great pains to structure their [illegal] activities to avoid the reach of American securities laws,”<sup>143</sup> going so far as to “prevent any sales [of tainted stock] to Americans.”<sup>144</sup> Thus, the corporate defendants did not cease their illegal conduct, they just shifted it across borders, targeting legally powerless purchasers abroad. This way the corporate defendants minimized their risk of lawsuits while at the same time “retain[ing] the benefits that the conspiracy accrued abroad.”<sup>145</sup> The only one who benefits from such an arrangement is the corporate defendant, who is laughing all the way to the bank.

The traditional logic was that as long as corporations were conducting themselves legally within the United States, then the U.S. federal laws had done their job.<sup>146</sup> But this logic demonstrates little

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<sup>141</sup> *Id.* at 267.

<sup>142</sup> 519 F.2d 974 (2d Cir. 1975).

<sup>143</sup> *Id.* at 982 (quoting district court opinion).

<sup>144</sup> *Id.* at 984 (quoting district court opinion).

<sup>145</sup> *Empagran S.A. v. F. Hoffman-LaRouche, Ltd.*, 315 F.3d 338, 356 (D.C. Cir. 2003), *vacated*, 542 U.S. 155 (2004).

<sup>146</sup> *See Bersch*, 519 F.2d at 985 (suggesting that Congress did not intend to waste the “precious resources of the United States courts” enforcing corporate conduct in other countries).

understanding for the workings of a global economy. When a corporation engages in misconduct, the resulting economic harm is not limited to the locus of the conduct. The harm spreads outward, injuring U.S. consumers as well as the foreign consumers who were directly victimized. In *Bersch*, for example, the certifying district court judge observed that the collapse in the price of defendants' shares, which was a direct result of defendants' illegal conduct outside of the United States, had "adverse effects upon the American securities markets."<sup>147</sup> A financial markets expert opined in the case that the illegal conduct "increased the problems of United States corporations in seeking to raise capital abroad" and had "adverse effects on the balance of payments and the price of American securities generally."<sup>148</sup>

Anticompetitive conduct (i.e., antitrust violations) abroad have a similar ripple effect into the U.S. economy. One federal appellate judge stated that "a global price-fixing scheme could sustain monopoly prices in the United States even in the face of domestic liability, since the profits from abroad would subsidize the U.S. operations."<sup>149</sup> Thus, in order to truly protect U.S. consumers, federal judges must deter illegal conduct abroad, not just in the United States. As the *Empagran* judge warned, "Disallowing suits by foreign purchasers injured by a global conspiracy because they themselves were not injured by the conspiracy's U.S. effects runs the risk of inadequately deterring global conspiracies that harm U.S. commerce."<sup>150</sup> This Note is not advocating that U.S. courts open their doors to victims of all corporate wrongdoing worldwide. However, when the illegal conduct has clear connections to the United States—such as when the misconduct is carried out by a U.S. corporation or when the misconduct has a substantial impact upon the U.S. economy—federal judges must permit all victims to avail themselves of the class device, regardless of their domicile or citizenship.

The other possible scenario is that corporations, knowing that most of the world has no adequate legal remedy, do not curb their illegal conduct at all, either in the United States or abroad. The Supreme Court observed:

If foreign plaintiffs were not permitted to seek a remedy for their . . . injuries, persons doing business both in this country and abroad might be tempted to enter into . . . conspiracies affecting American consumers in the expectation that the illegal profits they could

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<sup>147</sup> *Id.* at 984 (quoting district court opinion).

<sup>148</sup> *Id.* at 987–88 (quoting affidavit of Professor Morris Mendelson, Associate Professor of Finance, Wharton School of the University of Pennsylvania).

<sup>149</sup> *Empagran*, 315 F.3d at 356 (discussing Judge Higginbotham's dissent in *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001), an earlier antitrust action).

<sup>150</sup> *Id.*

safely extort abroad would offset any liability to plaintiffs at home.<sup>151</sup>

Even if the wrongdoers have to pay out large damages to U.S. purchasers, as long as courts exclude foreign claimants from class action lawsuits the corporations retain a large portion of the foreign profits. If the misconduct stretched far enough around the globe, there is a realistic chance that the large sums gained from the foreign misconduct would more than make up for the U.S. liability. U.S. courts can deter such conduct only if all claimants, both domestic and foreign, are permitted to sue as a class.

In a globalized marketplace, U.S. society suffers if foreign claimants are excluded from class action lawsuits. Even if a judge believes that the U.S. courts are intended to protect only U.S. citizens and residents, when corporate wrongdoing has an international dimension the judge cannot protect U.S. citizens unless he certifies the entire class, including foreign class members. Certifying classes containing foreign members is the only way to ensure that class action lawsuits successfully deter illegal conduct.

## 2. *Foreign Investor Confidence is Crucial to U.S. Markets*

Investor confidence is not solely a domestic problem. The U.S. economy relies upon a steady influx of foreign investment to remain healthy. In fact, analysts estimate that the United States needs approximately \$45 billion to \$50 billion per month in foreign investment to keep the economy healthy.<sup>152</sup> According to the Wall Street Journal, “This money is the economic lifeblood of America. It helps the U.S. expand and modernize factories, secure mortgages, build highways—even fight the war in Iraq.”<sup>153</sup>

A large chunk of foreign investment comes through the purchase of stocks and bonds on U.S. securities markets.<sup>154</sup> If foreign investors lose confidence in U.S. securities markets, they will put their money instead into foreign markets and other, perceivably more secure, investments. This withdrawal of foreign investment from U.S. financial markets would be detrimental. One Wall Street Journal article warned:

Were foreign investors to flee the U.S., it would depress the dollar further and faster. Reduced foreign purchases of U.S. stocks could

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<sup>151</sup> Pfizer, Inc. v. Gov’t of India, 434 U.S. 308, 315 (1978), *quoted in Empagran*, 315 F.3d at 355.

<sup>152</sup> See Deborah Lagomarsino, *Foreign Inflows Boosted U.S. Securities in November*, WALL ST. J., Jan. 19, 2004, at C3.

<sup>153</sup> Joel Millman et al., *Buying American: Foreign Cash Flow Is Vital to U.S.—But Will it Last?* WALL ST. J., Jan. 15, 2004, at A1.

<sup>154</sup> *Id.*

cause the market to tumble. Reducing foreign purchases of U.S. bonds could boost the interest rates set in bond markets. If the foreign flight were severe enough, it could push the U.S. back into recession.<sup>155</sup>

Thus, it is in United States's best interest to maintain investor confidence among foreign investors, not just domestic investors.

Regulation is one way to maintain investor confidence.<sup>156</sup> As previously discussed, however, the SEC is overworked and understaffed.<sup>157</sup> As a result, the SEC is not able to proactively regulate corporate behavior to the degree necessary to deter acts of fraud and misrepresentation. One needs only look at the recent spate of accounting fraud cases (i.e., Enron and WorldCom) to see the shortcomings of government regulation. As securities markets tumbled in the wake of these disasters, investors—both foreign and domestic—lost confidence in U.S. markets.<sup>158</sup> This is why securities class actions are so crucial. In the wake of each corporate scandal, investors become increasingly more disillusioned with their investment opportunities.<sup>159</sup> They do not trust securities professionals, large corporations, or the SEC. The one reassurance that investors have left is the knowledge that through private rights of action and class action lawsuits, they can sue these professionals and corporations if their investments are diminished due to misconduct. This comfort—however small it may be—keeps investor confidence up and U.S. financial markets functioning. If foreign investors are continuously excluded from class action lawsuits, they essentially lose their private right of action for securities fraud, one of the major benefits of investing in U.S. financial markets instead of investing elsewhere. It is important to realize that

[f]oreigners with money to invest are always comparing the alternatives. In a global market, they can quickly buy or sell U.S. Treasury notes or Thai stocks or euro bonds. Markets often are seen as a single force of nature, like the tides or the wind. But they are . . .

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<sup>155</sup> *Id.*

<sup>156</sup> See JOSEPH C. LONG, 12 BLUE SKY LAW § 1:58 (“Until recently, little or no regulation was the norm in most of the industrialized countries of the world. However, the American markets, because of the joint federal-state regulatory system, have traditionally enjoyed the highest degree of investor confidence of any of the world’s markets for fairness and stability.”); cf. Lynn A. Stout, *The Investor Confidence Game*, 68 BROOK. L. REV. 407, 412 (2002) (suggesting that investor confidence is not a problem when regulatory systems work as they should).

<sup>157</sup> See *supra* notes 126–27 and accompanying text.

<sup>158</sup> See, e.g., Millman et al., *supra* note 153, at A1 (discussing one Japanese banker’s unease about investing in U.S. markets after “all the newspaper stories about accounting scandals and other corporate wrongdoing”).

<sup>159</sup> See *id.* (telling of one Chinese businessman who no longer trusts the U.S. economy or its currency, and therefore is “not planning to put his personal money back into the U.S. any time soon”).

made up of many individuals placing bets—bets that matter profoundly to American prosperity.<sup>160</sup>

If the United States loses foreign investment to other markets, U.S. prosperity will suffer. This is why federal judges must permit foreign investors to join securities class action lawsuits. The certifying judge in *Bersch v. Drexel Firestone, Inc.* understood this.<sup>161</sup> Observing that the corporate defendants' fraud resulted in a "decline in the purchase of United States securities by foreigners"<sup>162</sup> and "problems of United States corporations in seeking to raise capital abroad,"<sup>163</sup> Judge Frankel tried to permit the foreign claimants to be class members.<sup>164</sup> Unfortunately, the appellate judge was less understanding of global markets and excluded the foreign claimants from the class.<sup>165</sup> The district judge in *In re DaimlerChrysler AG Securities Litigation* was equally unversed in global finance and also excluded foreign claimants from a securities class.<sup>166</sup> Judge Farnan's decision to exclude foreign claimants in the *DaimlerChrysler* case was even more problematic because a substantial portion of the alleged fraud had occurred in the United States, as the result of a merger between a U.S. and a German corporation.<sup>167</sup>

Especially when an act of fraud is so intimately tied to U.S. markets, federal judges must permit foreign claimants to enter class action lawsuits when the class is the only cost-effective way for investors to avail themselves of their right to sue. This is the only way that foreign investors will remain confident enough in U.S. markets to continue investing. If foreign claimants are excluded from securities classes, everyone loses. Foreign claimants suffer because they lose their investments, U.S. corporations suffer because it becomes more difficult to raise capital, and U.S. citizens suffer as foreign investors pull their money out of U.S. financial markets and the economy declines as a result. Congress understood this risk when it wrote the securities laws and expressed a preference for private rights of action for violation of these laws.<sup>168</sup> The courts must honor this legislative preference by permitting all claimants to join class action lawsuits.

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<sup>160</sup> *Id.*

<sup>161</sup> *See* *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 987–88 (2d Cir. 1975).

<sup>162</sup> *Id.* at 988 (citing Mendelson affidavit).

<sup>163</sup> *Id.* at 987 (citing Mendelson affidavit).

<sup>164</sup> *Id.* at 982.

<sup>165</sup> *Id.* at 1001.

<sup>166</sup> *See In re DaimlerChrysler AG Sec. Litig.*, 216 F.R.D. 291, 301 (D. Del. 2003).

<sup>167</sup> *Id.* at 294.

<sup>168</sup> *See supra* notes 135–38 and accompanying text.

## IV

SAVING THE DETERRENCE OBJECTIVE: WHY THE SCALES TIP  
IN FAVOR OF INCLUDING FOREIGN CLAIMANTS  
IN A CLASS

As this Note has explained, while creating a legal remedy for victims with small claims is an important objective, it does not come without a price. Small-claim class action lawsuits “impose[ ] additional burdens on the judicial system and certain classes of litigants.”<sup>169</sup> They expose corporate defendants to large litigation costs and damages, which are passed on to the public through increases in the prices of the goods and services that these defendants provide.<sup>170</sup> They expose the courts to large, complex lawsuits requiring a high degree of judicial management,<sup>171</sup> which places an additional strain on the already overtaxed district courts.

The courts are not blind to the side effects of small-claim class action litigation. They are also not willing to completely sacrifice judicial economy for the sake of creating legal remedies. This is the fundamental problem that judges face when asked to certify classes consisting of foreign claimants: Judges cannot fully deter corporate misconduct if they *exclude* foreign claimants from the class, but they cannot ensure efficiency—in the sense of judicial economy and finality from future, related litigation—if they *include* foreign claimants in the class. In the majority of cases, however, this tension is more theoretical than actual. The fact that a foreign court will not automatically afford preclusive effect to a U.S. class action judgment does not mean that foreign claimants will, *in fact*, sue again in foreign courts, as other barriers often exist that make relitigating the case in a foreign court impracticable.<sup>172</sup> These same barriers often mean that foreign claimants have no alternate remedy—either in the United States or abroad—if a federal judge excludes them from a class.<sup>173</sup> Thus, in the majority of cases, deterrence is a real problem, but efficiency and procedural fairness are not.

In order to determine when it is desirable to include foreign claimants in a class, certifying judges must go beyond facial assumptions about “efficiency” and “manageability” of the class and pay greater attention to the circumstances of each particular case. Certifying judges must examine on a case-by-case basis whether foreign

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<sup>169</sup> FRIEDENTHAL, KANE & MILLER, *supra* note 39, § 16.1, at 722.

<sup>170</sup> See Hill, *supra* note 119, at 154 (“[T]he great expense of the litigation will often be reflected in higher prices to consumers, negating any beneficial effect of enforcing the law.”).

<sup>171</sup> See Miller, *supra* note 2, at 667.

<sup>172</sup> See *infra* Part IV.A.

<sup>173</sup> See *infra* Part IV.B.



claimants have a realistic means to sue again in foreign courts if the settlement or verdict is not in their favor. They must also examine whether foreign claimants have an alternative remedy if excluded from the class. The current inquiry lacks the depth that is necessary to really understand the problem. When the U.S. class device is the foreign claimants' only cost-effective method of bringing suit, a certifying judge must not exclude foreign claimants from the class. Doing so would substantially undermine the deterrent objective of the class device without reason, since the lack of adequate alternative litigation options minimizes the risk of subsequent litigation, and therefore obviates the efficiency and finality concerns that weigh in favor of excluding foreign claimants in the first place.

#### A. The Difficulties of Suing Again in Foreign Courts

When considering the *res judicata* concerns introduced by foreign class members, few federal judges are factoring in the actual likelihood of repeat litigation. Instead, they are taking the mere fact that a foreign court would not recognize a U.S. class judgment as conclusive evidence that the class mechanism is no longer "superior," as required by Rule 23.<sup>174</sup> They are leaving out the equally important consideration of whether absent foreign class members actually would (or could) sue again in foreign courts, from a practical perspective, thereby triggering the *res judicata* problem in the first place.

Currently, judges ask whether foreign claimants *could* sue again in foreign courts if the settlement or verdict is not in their favor. Judges decide whether or not foreign claimants could sue again in foreign courts based on affidavits from foreign lawyers about the state of the law in their home countries.<sup>175</sup> This is not sufficient. The attorney affidavits that certifying judges rely on to deny foreign claimants access to classes are usually offered to the court by defendants, as a means of contesting the motion for class certification.<sup>176</sup> While these affidavits may be technically accurate, they tell only half the story. These affidavits do not tell of the procedural and legal barriers to suit that exist in the plaintiffs' home countries that make it highly improbable that absent foreign class members would sue again in foreign courts. If certifying judges would look at the whole picture, they would often realize that the actual risk that foreign class members will sue again, on the same facts, in foreign courts is much less likely than lawyers' affidavits and theoretical discussions suggest. The Supreme

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<sup>174</sup> See *supra* notes 47–49 and accompanying text.

<sup>175</sup> See, e.g., *In re Lloyd's Am. Trust Fund Litig.*, No. 96 CIV 1292, 1998 WL 50211, at \*15 n.7 (S.D.N.Y. Feb. 6, 1998) (relying upon affidavits opining as to the effect of U.S. class judgments abroad); *In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24, 48 (S.D. Cal. 1975) (same).

<sup>176</sup> See, e.g., *In re Lloyd's*, 1998 WL 50211, at \*15 n.7.

Court once warned that “great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.”<sup>177</sup> Federal judges must heed this warning when considering class certification motions.

The risk that absent foreign class members will sue again in the courts of their home countries is often more theoretical than actual. A number of barriers, including lack of contingent fees, smaller damage awards, and the concentration of the evidence outside of the claimants’ home countries, make suing again on the same set of facts outside of the United States unrealistic.<sup>178</sup> Granted, given the skepticism with which many other countries approach U.S. class judgments, it is often true that the foreign claimants *could* sue again, as the U.S. judgment would not have preclusive effect. The practical difficulties involved in litigating abroad, however, usually make this theoretical possibility impracticable.<sup>179</sup> If judges were to weigh these factors more carefully when considering certification of a class, in most cases they would discover that the risk of repeat litigation in foreign courts is minor and does not justify exclusion of foreign claimants. This is exactly the conclusion the judge reached in *In re U.S. Financial Securities Litigation*.<sup>180</sup>

#### B. The Scarcity of Adequate Remedies Outside of the Class Device

Few other countries have class action devices.<sup>181</sup> Many foreign countries now recognize the value of group and representative litigation devices in cases in which “the claims of many individuals arise from the same basic conduct of a defendant,”<sup>182</sup> but the growth of group and representative litigation in other countries is still slow.<sup>183</sup>

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<sup>177</sup> *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

<sup>178</sup> *See, e.g., Cappalli & Consolo, supra* note 139, at 267 (discussing various reasons why an Italian investor who suffers small losses at the hands of corporate executives would not sue, including uncertain legal standards, attorneys’ fees disproportionate to the size of the claim, and the difficulties involved in collecting proof).

<sup>179</sup> *See, e.g., In re U.S. Fin. Sec. Litig.*, 69 F.R.D. at 48–49 (recognizing that even though class members would likely not be bound in their home countries by a U.S. class judgment against them, “practical difficulties,” such as the location of evidence in the United States, make lawsuits in the foreign claimants’ home countries “virtually impossible”).

<sup>180</sup> *Id.*

<sup>181</sup> *See Sherman, supra* note 3, at 424–32 (describing the Australian federal class device and the Canadian class device, the two foreign group-litigation mechanisms that most closely resemble the U.S. class action).

<sup>182</sup> *Id.* at 401.

<sup>183</sup> This is most likely because group and representative litigation is not well-suited to other legal cultures. *See* Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms From Class Actions*, DUKE J. COMP. & INT’L L., Summer 2003, at 125, 125–26 (discussing how attorney fee-shifting practices in other countries deter group litigation); Sherman, *supra* note 3, at 402 (observing that even in countries that maintain group litigation devices, group litigation is not as popular as in the United States, and attributing this dif-

Of those countries that do maintain group litigation mechanisms, few are structured in a manner similar to the U.S. class action.<sup>184</sup> For example, in some countries a state-sanctioned consumer association must initiate the group action, so the availability of this form of litigation is extremely limited.<sup>185</sup> In addition, some countries limit group litigants to injunctive relief only.<sup>186</sup> Without monetary damages, the individual claimant does not receive compensation, either for her injuries or for the hassle of bringing the lawsuit. This does not comport with U.S. notions of an “adequate” remedy. Thus, group and representative litigation is rarely available to foreign claimants. Without a group litigation device, victims with small claims will rarely be able to bring lawsuits in their home countries.

When the financial losses suffered by foreign investors or consumers are small, independent lawsuits in the courts of the claimants’ home countries are rarely feasible. It is true that most other countries require the losing party to pay the reasonable court costs and attorneys’ fees of the losing party,<sup>187</sup> so the actual costs of litigation may no longer outweigh the potential return. It is also true, however, that most other countries do not allow contingent fee arrangements, so a claimant can bring a lawsuit only if she has enough money to pay the attorney upfront and wait for reimbursement after the lawsuit is settled and she has prevailed. Even if the claimant has the disposable cash—or litigation insurance—to pay the attorney and hope for a favorable outcome years later, the small amounts at stake hardly justify such an investment. This rules out any hope of litigation for a large number of foreign claimants.

In addition, other countries do not permit punitive or treble damages.<sup>188</sup> Therefore, at the end of the litigation, the individual litigant can recover only actual damages, which, in the case of a securities, antitrust, or consumer action, can be quite small. Even if the litigant will get court and attorneys’ fees back at the end of the lawsuit, the nonmonetary costs of filing and maintaining a lawsuit—such as hours spent in court or interacting with attorneys and the stress of an

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ference to “such legal differences as the absence of juries, a career judiciary, less activist and entrepreneurial attorneys, and the ‘loser-pays’ rule for shifting attorneys’ fees”).

<sup>184</sup> See Sherman, *supra* note 3, at 418–32 (discussing group litigation in Germany, Sweden, United Kingdom, Australia, and Canada).

<sup>185</sup> See *id.* at 419–20 (describing German and Swedish group-litigation practices, and referring to similar practices in France and Greece).

<sup>186</sup> See *id.* at 419 (noting that German consumer associations may sue for injunctive relief, but not monetary damages).

<sup>187</sup> Most civil-law countries require that the losing party pay the reasonable court costs and attorneys’ fees of the prevailing party. See Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 651 (referring to the loser-pays practice in the United Kingdom and the civil-law countries of Continental Europe).

<sup>188</sup> See *supra* note 85 and accompanying text.

adversarial process—far outweigh the miniscule returns that the individual claimant would walk away with at the end of the action.

When a judge considers whether to certify a class consisting of foreign claimants, the judge must consider each of these factors. The judge must look at whether group or representative litigation devices exist in the countries where the foreign class members reside, and, if so, must decide whether such devices are readily available to the claimants. If no group litigation is possible, the judge must look at whether bans on contingent fees and punitive or treble damages make independent litigation undesirable.

In addition to these factors, the certifying judge must also consider where the bulk of the evidence necessary to prove the case is located. If the defendant is a U.S. corporation, it is highly likely that documents and other evidence will be located in the United States. If the defendant is a foreign corporation but a substantial part of the alleged wrongdoing was perpetrated in the United States, it is also likely that witnesses and documents will be located in the United States. As the judge in *In re U.S. Financial Securities Litigation*<sup>189</sup> recognized, when the bulk of the evidence is located in the United States, the practical difficulties of shipping and translating documents and getting witnesses to testify abroad often rule out an otherwise feasible suit in a foreign court.<sup>190</sup>

While collecting and evaluating this additional information may seem like an added burden to the certifying judge, it does not need to be. As mentioned above, it is class counsels' responsibility to prove as part of the motion for certification that the class meets all the requirements of Rule 23.<sup>191</sup> This includes the requirement of "superiority."<sup>192</sup> Since all of the facts discussed above speak to the "superiority" of class action, plaintiffs bear the burden of pleading these facts as well. Thus, this added information would be included by class counsel as part of the motion to certify the class. Once pled, however, it is the certifying judge's obligation to weigh these factors carefully to determine if an alternate method of suit actually exists.

Theoretical inefficiencies should not tip the scales in favor of excluding foreign claimants since other, equally legitimate, goals of the class action will be lost as a result. Excluding foreign claimants from class actions to avoid theoretical risks serves neither plaintiffs nor the judicial system as a whole. Given that foreign claimants rarely have an adequate remedy outside of the class device or a realistic and practical way to relitigate the same case in a foreign court, federal courts should

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<sup>189</sup> 69 F.R.D. 24 (S.D. Cal. 1975).

<sup>190</sup> *See id.* at 48–49.

<sup>191</sup> *See supra* notes 35–38 and accompanying text.

<sup>192</sup> *See supra* notes 47–50 and accompanying text.

adopt a presumption in favor of including foreign claimants in small-claim class action lawsuits. Defendants could then rebut this presumption by presenting concrete evidence that the foreign claimants do, in fact, have adequate alternative remedies or could, from a practical standpoint, sue again in the courts of their home countries. This default presumption in favor of including foreign claimants would ensure that the deterrence and investor-confidence benefits of the class action are not destroyed based upon theoretical, but unrealistic, possibilities.

### CONCLUSION

Federal judges must understand that U.S. society, not just the foreign claimants themselves, may suffer if foreign claimants are consistently excluded from class actions as a result of efficiency concerns. Efficiency is not the only reason why the class action mechanism developed. Deterrence of corporate wrongdoing and the promotion of investor confidence are equally desirable goals. Without including foreign claimants in class actions, these goals are impossible to achieve. There are times when these enabling functions of the class action device far outweigh any potential decrease in efficiency created by foreign claimants. This is especially true in cases in which foreign claimants do not have an adequate remedy abroad, and the amounts lost by individual consumers or investors are so small that independent suits in U.S. courts are unrealistic.<sup>193</sup> In such cases, a U.S. class action lawsuit is not only the claimants' only method of recourse, it is society's only opportunity to litigate the suit in order to punish the wrongdoers and deter such conduct in the future.

Judges must understand that granting foreign victims of corporate wrongdoing access to U.S. courts has implications far beyond compensating the individual victims. Permitting foreign claimants access to U.S. class action lawsuits also, in a less direct way, protects U.S. citizens<sup>194</sup> by deterring corporate wrongdoing and by promoting con-

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<sup>193</sup> This includes most securities, antitrust, and consumer actions. *See, e.g., In re DaimlerChrysler AG Sec. Litig.*, 216 F.R.D. 291, 300 (D. Del. 2003) (acknowledging that in securities actions the damages of individual plaintiffs are often "too small to justify a suit against a large corporate defendant" (quoting *Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 378 (D. Del. 1990))); HENSLER ET AL., *supra* note 2, at 17 (noting that in the context of consumer class actions, "the consumer is [often] shut out of the courthouse by economic realities" (quoting *Consumer Class Action: Hearings Before the Consumer Subcomm. of the S. Comm. on Commerce*, 92d Cong., 1st Sess. 38 (1971) (statement of Sen. Frank E. Moss, Chair, Senate Committee on Commerce))).

<sup>194</sup> *See, e.g., HENSLER ET AL., supra* note 2, at 4 ("In the long run . . . consumers are well-served by lawsuits that succeed in eliminating inappropriate business practices that would otherwise impose unwarranted costs on individuals.").

fidence in U.S. financial markets among foreign investors.<sup>195</sup> These are worthwhile goals.

When faced with motions to certify classes consisting of foreign members, federal judges must approach the certification process carefully. It is true that the binding nature of the class action lawsuit is the class action's most distinctive feature, so the concern that foreign claimants will undermine the efficiency of the class because they will not be bound by the final judgment is legitimate. One could certainly argue that without the binding force of the class action lawsuit, other forms of suit become superior. But federal judges must understand that the efficiency of the class often is not threatened to the extent that the defendants' affidavits suggest. The theoretical ability to sue does not always translate into an actual remedy.<sup>196</sup> Federal judges must also understand that any minor decrease in efficiency brought on by the inclusion of foreign claimants is usually far outweighed by the enabling benefits of the class device. When corporate wrongdoing has an international dimension, the federal judicial system cannot deter corporate wrongdoing or ensure healthy financial markets unless foreign claimants are included in class actions along with their domestic counterparts.

Given the difficulties of bringing small-claim lawsuits in the courts of most foreign countries, the presumption must be in favor of permitting the foreign claimants to join the class. Only if the defendant can prove that alternative remedies are realistically available to the foreign claimants—either in the United States or abroad—should the judge refuse to include the foreign claimants. In the majority of cases, however, other methods of suit are not available to the claimants, making the class action lawsuit “superior.” In these cases, the judge must certify the entire class, including the foreign claimants. After all, “one of the rationales for Rule 23,” which judges must remember when deliberating over certification, “is to prevent the ‘death knell’ of a nonfrivolous action simply because it is too expensive for small investors to prosecute individually.”<sup>197</sup> This rationale applies to foreign, not just domestic, claimants. To protect this goal, when other forms of suit are impracticable the certifying judge *must* permit foreign claimants to join the class.

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<sup>195</sup> See discussion *supra* Part III.C.

<sup>196</sup> See *supra* Part IV.A.

<sup>197</sup> *In re* U.S. Fin. Sec. Litig., 69 F.R.D. 24, 46 (S.D. Cal. 1975).