

## Articles:

# Class Action and Aggregate Litigation: A Comparative International Analysis

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### ABSTRACT

This Article examines the American class action through a comparative lens, highlighting its advantages and disadvantages relative to three collective action devices from England and Wales: the representative action, the Group Litigation Order, and the Competition Appeal Tribunal action. Five insights emerge. First, the Article tracks the rise of “professional objectors” in the U.S. and proposes ways England can curb similar abuses. Second, the Article excavates the potential for collusion between American class representatives, counsel, and defendants, and identifies ways England can avoid the same perverse incentives. Third, the Article details problematic examples of cy pres

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settlements in America as a cautionary tale for England, which recently expanded reliance on cy pres relief in consumer regulatory suits. Fourth, the Article grapples with the uniquely American issue of “strike suits”—meritless putative class actions filed for their settlement value—and applauds steps England has taken to avoid similar misuse. Fifth, the Article discusses the evolving U.S. jurisprudence on class action waivers with an eye to reform in both systems. In the end, the Article hopes to help jurists and litigants on both sides of the Atlantic attain a more efficient and effective system of aggregate litigation.

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#### I. INTRODUCTION

Good morning. It is great to be back with all of you. Last year at this gathering, I decided to take on the topic of legislative redistricting, or to employ the pejorative, “gerrymandering.” I expected that by the time we had convened here in Cambridge in 2018, the U.S. Supreme Court would have provided guidance on the subject. Instead, the Court decided to wait me out. Well, as the old adage goes, “fool me once . . . .” So I decided some months ago that this year I would talk about a jurisprudential subject that has long intrigued me: the U.S. class action device and complex litigation. Specifically, I intend to discuss a few of the problems that have arisen in U.S. class actions and draw some connections between the U.S. class action and collective actions here in England and Wales.

In 1974, Supreme Court Justice William Douglas encapsulated the value of a class action, explaining:

I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it. Some of these are consumers whose claims may seem de minimis but who alone have no practical recourse for either remuneration or injunctive relief. Some may be environmentalists who have no photographic development plant about to be ruined because of air pollution by radiation but who suffer perceptibly by smoke, noxious gases, or radiation. Or the unnamed individual may be only a ratepayer being excessively charged by a utility or a homeowner whose assessment is slowly rising beyond his ability to pay. The class action is one of the few legal remedies the small claimant has against those who command the status quo.<sup>1</sup>

More recently, it has been explained that the “central rationale for the class action aggregation” is that it “enables plaintiffs to exploit the ‘economies of scale’ the defendant already naturally enjoys from treating separate claims as a single litigation unit” and thereby prevents “the defendant from using the plaintiffs’ numerosity against them.”<sup>2</sup> As explained by Judge Posner:

The class action is an ingenious procedural innovation that enables persons who have suffered a wrongful injury, but are too numerous for joinder of their claims alleging the same wrong committed by the same defendant or defendants to be feasible, to obtain relief as a group, a class as it is called. The device is especially important when each claim is too small to justify the expense of a separate suit, so that without a class action there would be no relief, however meritorious the claims.<sup>3</sup>

That being said, there can be no doubt that the U.S. class action device also presents risks that can, and have at times, damaged the integrity of the judicial process. As noted by Congress in the 2005 Class Action Fairness Act, “[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties,” but “there have been abuses of the class action device that have – (A) harmed class members with legitimate claims and defendants that have acted responsibly; (B) adversely affected interstate commerce; and (C) undermined public respect for our judicial system.”<sup>4</sup>

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1. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 185–86 (1974) (Douglas, J., dissenting in part).

2. Bruce Hay & David Rosenberg, “*Sweetheart*” and “*Blackmail*” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1380–81, 1383 (2000).

3. *Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014).

4. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4 (codified as amended in 28 U.S.C. §§ 1332(d), 1453, and 1711–15 (2005)).

Although I'm not aware of a data bank that currently maintains statistics as to the number of putative class actions filed in the United States each year,<sup>5</sup> filings certainly number in the thousands.<sup>6</sup> Indeed, in the one category of putative class action filings that is closely monitored—federal securities class actions—403 putative class actions were filed in federal court in 2018 alone.<sup>7</sup> The same study reports that, since 1996, settlements in securities class actions alone have reached a total of over \$99 billion.<sup>8</sup> One would hope that the vast majority of these are meritorious claims and good faith settlements, but we know that at least some are not.

And our class action device has often been viewed with skepticism on this side of the Atlantic.<sup>9</sup> Based on the potential for abuse and the vast sums involved in U.S. class actions, outsiders looking in (including our friends here in England) also have reason to view the U.S.-style class action with concern.<sup>10</sup> To be sure, a liberal class action device offers many potential advantages. And the trend seems to be that European countries are borrowing certain features of the U.S. model.<sup>11</sup> As explained by two distinguished experts in the class action field: “Once decried as the perversity of rapacious Americans, class actions are now the focus of

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5. Deborah R. Hensler, *From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally*, 65 U. KAN. L. REV. 965, 985 (2017) (noting that “no jurisdiction publishes official statistics on the number of complaints filed in which plaintiff seek to proceed collectively” and “[n]o one knows how many class actions are filed annually in federal or state courts in the United States”).

6. *Id.* at 986–87 (citing Deborah R. Hensler, *Can Private Class Actions Enforce Marketplace Regulations? Do They? Should They?*, in *COMPARATIVE LAW AND REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS* (Francesca Bignami & David Zaring eds., 2016)) (noting author’s previous estimate that approximately 6,500 class action complaints were filed in 2007).

7. Stanford Law Sch., *Filings by Year: Federal Securities Class Action Litigation 1996 – YTD*, SEC. CLASS ACTION CLEARINGHOUSE, <https://stanford.io/2lKqGtc> (last visited Dec. 22, 2019) [hereinafter *Clearinghouse Filings 1996–YTD*].

8. Stanford Law Sch., *Key Stats: Box scores or key statistics from 1996 to YTD*, SEC. CLASS ACTION CLEARINGHOUSE, <https://stanford.io/2lUzBZ5> (last visited Sept. 21, 2019).

9. Neil H. Andrews, *Fundamentals of Multi-Party or Collective Litigation* 16 (Univ. of Cambridge Faculty of Law, Research Paper No. 21/2014, 2014), <https://bit.ly/2mLZSI> (noting the “xenophobic fear of the USA system” in the UK, and explaining that “[t]he fear is strong in the United Kingdom but rises to terror in some Member States of the European Union”).

10. As Lord Denning has stated, “[a]s a moth is drawn to the light, so is a litigant drawn to the United States.” See *Smith Kline & French Labs. Ltd. v. Bloch* [1983] 1 WLR 730 at 733 (Eng.); see also Shintean Ng, *Class Action (Not US-Style): Enhancing Access to Justice*, 6 MANCHESTER REV. L. CRIME & ETHICS 49, 53 (2017) (“Despite the argument that class action provides greater access to the courts, it is frequently criticized for creating an unsavoury litigation culture, as is the case in the US jurisdiction.”).

11. See Hensler, *supra* note 5, at 966, 967 tbl.1 (noting that as of 2017, thirty-seven jurisdictions in addition to the U.S. adopted some sort of class action procedure, including fifteen countries in Europe).

significant reform efforts in many European countries.”<sup>12</sup> In developing their own class action system, England and Wales have moved hesitantly toward adopting some elements of the U.S. system, while imposing additional safeguards and restrictions aimed at preventing some of the abuses in the U.S. system.

In the time allotted me, I will briefly describe the U.S. class action system and its counterpart in England and Wales. I will then explore some of the hurdles we have faced in the U.S. and, based on our experience, try to provide some insight into how England and Wales might avoid some of the problems we have experienced. As one academic has put it, “[t]here is no reason to believe that the whole ‘Yankee package’”—warts and all—need “invade a foreign system through the window opened by the class action device.”<sup>13</sup>

## II. U.S. CLASS ACTION SYSTEM

As some of you may know, class actions are governed by Federal Rule of Civil Procedure 23. The Rule has antecedents that reach all the way back to 1842 and Equity Rule 48.<sup>14</sup> And most scholars agree that the roots of the class action lie with the “bill of peace,” an equitable device that developed here on British soil. But it is Rule 23, as amended in 1966, that embodies the modern class action as we know it.

The first major step for a plaintiff in pursuing any class action is to satisfy the prerequisites under Rule 23(a). Those are (1) Numerosity – that the class is sufficiently large to justify class treatment, rather than proceeding by another procedural device, such as joinder; (2) Commonality – that there are material questions of law or fact common to the class; (3) Typicality – that the claims of the representative parties align with the claims of the absent class members; and (4) Adequacy – that the representative parties are capable of “fairly and adequately” representing and protecting the interests of the class.<sup>15</sup> The judge to whom the class action has been assigned must determine that all four requirements have been proven.

Rule 23(b) provides for three types of class actions, so the second major determination to be made in any class action is deciding the appropriate class type for the claims at issue. The named plaintiff or plaintiffs will ordinarily plead in a complaint—as well as in a motion to certify a class—which of these types should be certified.

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12. Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 177, 179 (2009).

13. Antonio Gidi, *Class Actions in Brazil – A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 322 (2003).

14. See generally STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

15. See FED. R. CIV. P. 23(a).

First, Rule 23(b)(1) provides for use of the class action device where class treatment is necessary to prevent inconsistent judgments against the defendant, or to ensure that absent class members' rights are protected, such as in a limited fund case where all claims cannot be satisfied in whole. For example, some of you may recall the massive silicone-gel breast implant litigation of the 1990s. 21,000 cases were consolidated into a multidistrict litigation ("MDL") in the Northern District of Alabama.<sup>16</sup> Claims against one defendant manufacturer, Inamed, were certified under Rule 23(b)(1)(A) as a settlement-only class.<sup>17</sup> Approximately 15,000 claims had been filed against Inamed,<sup>18</sup> and the historic settlement value of the claims against the company was on average \$18,500 per claim.<sup>19</sup> This amounted to a total liability of nearly \$280 million. But Inamed had a negative valuation of \$1.7 million.<sup>20</sup> The District Judge explained, "the costs and risks of individual breast implant claims greatly exceed Inamed's limited resources, which would soon be exhausted if individual litigation were allowed to continue, and . . . Inamed therefore constitutes a 'limited fund' against which claims are properly subject to class certification under Rule 23(b)(1)(B)."<sup>21</sup>

Second, Rule 23(b)(2) provides for class-wide injunctive or declaratory relief. This class type was created mostly out of a desire to provide redress in civil rights cases. Indeed, the 1966 drafting committee expressly identified civil rights cases as "illustrative" of the type of action where the 23(b)(2) class mechanism will apply.<sup>22</sup> By nature, class actions under both Rule 23(b)(1) and 23(b)(2) are mandatory. That means that all class members must remain part of the class, since a class-wide judgment is the only way to successfully bind them all. Anything less would result in the types of inconsistent verdicts those class types are designed to avoid.

Finally, Rule 23(b)(3) establishes what is generally considered the quintessential U.S. class action, and its adoption was a major innovation. A product of the 1966 amendments, it allows for a damages class action on an opt-out basis, and is now the most popular form of class action in the U.S.<sup>23</sup> And it's the class-type primarily relevant to our discussions today. Because the claims underlying Rule 23(b)(3) class actions could

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16. *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. 2:97-CV-11441-RDP, 2010 WL 11506713, at \*2 (N.D. Ala. May 19, 2010). For more on the MDL device, see *infra* text accompanying notes 37–44.

17. *Id.* at \*10.

18. *Id.* at \*2.

19. *Id.* at \*3.

20. *Id.*

21. *Id.* at \*10 (internal quotation marks omitted) (quoting the certification order, ECF No. 59 at ¶ 4).

22. See FED. R. CIV. P. 23(b)(2) advisory committee's note to 1966 amendment.

23. See Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1619 n.304 (2016).

instead be pursued on an individual basis, additional requirements must be satisfied before a class will be certified under that provision; the due process rights of individual class members must be protected. Specifically, a class representative must also establish that the questions of law or fact common to the class *predominate* over any individual issues, and that the class action device is *superior* to other methods of adjudicating the case.<sup>24</sup> Additional notice requirements also apply to Rule 23(b)(3) class actions to ensure that class members can exercise their opt-out rights on an informed basis.<sup>25</sup>

Although not express within Rule 23, some courts have imposed a so-called “ascertainability” requirement as part of the certification analysis for a (b)(3) class action, meaning that the class must be clearly defined so that members of the class can be identified.<sup>26</sup> For example, the Court of Appeals for the Third Circuit, on which I sit, requires that the class be “defined with reference to objective criteria” and that there be “a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.”<sup>27</sup> Other courts have implied a more lenient standard, requiring only that the class be defined based on clear, objective criteria, without any feasibility requirement.<sup>28</sup> As an aside, given the circuit-split on the standard for ascertainability, review by the U.S. Supreme Court may be imminent. Or not. As you know, my prognostication skills are less than stellar. But regardless of whether a stricter or more lenient standard is appropriate, some level of ascertainability must exist.<sup>29</sup> Quite simply, the class action device will not be appropriate if significant individual fact-finding will be necessary to determine whether someone is even a member of the class.<sup>30</sup> Given the opt-out nature of Rule 23(b)(3) class actions, the ascertainability requirement is also necessary to ensure that class members can be given

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24. See FED. R. CIV. P. 23(b)(3).

25. FED. R. CIV. P. 23(c)(2)(B).

26. *E.g.*, *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 439 (3d Cir. 2017); *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 657 (7th Cir. 2015).

27. See *City Select Auto Sales Inc.*, 867 F.3d at 439.

28. See *Mullins*, 795 F.3d at 657–58.

29. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.222 (2004) (“Although the identity of individual class members need not be ascertained before class certification, the membership of the class must be ascertainable. Because individual class members must receive the best notice practicable and have an opportunity to opt out, and because individual damage claims are likely, Rule 23(b)(3) actions require a class definition that will permit identification of individual class members . . .”).

30. See *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012) (“If class members are impossible to identify without extensive and individualized fact-finding or ‘mini-trials,’ then a class action is inappropriate.”).

adequate notice of their opt-out rights.<sup>31</sup> All of this makes the certification process for Rule 23(b)(3) class actions very rigorous.

Apart from the standard Rule 23(b) certification process, Rule 23(e) also allows for class certification for the sole purpose of settlement. These so-called settlement-only classes have become increasingly popular in the last few decades. Under Rule 23(e), the parties must provide notice of the proposed settlement to the class.<sup>32</sup> In traditional *A v. B* litigation, a presiding judge has no formal role in settlement. But in a class action, because the court acts as something of a fiduciary for absent class members,<sup>33</sup> the judge must conduct a hearing to determine whether the settlement proposal is “fair, reasonable, and adequate.”<sup>34</sup> Class members, having received notice of a proposed settlement, also have the opportunity to file objections to the settlement.<sup>35</sup> If the court approves settlement of a class action—or if the case otherwise results in a judgment on the merits—such a judgment will be binding on all class members in Rule 23(b)(1) and (b)(2) class actions. In a Rule 23(b)(3) action, the judgment will have res judicata effect for all class members who chose not to opt-out of the class.<sup>36</sup>

We could spend all day discussing the many complexities of Rule 23. We have already covered the grist of what would be the first three sessions of the Class Action seminar I teach at Penn State Law. But for our purposes today, my summary of Rule 23(a) and (b) is enough.

Before I turn to discussion of English collective actions, I want to touch on another collective action procedure in the United States, the multidistrict litigation, or MDL. MDLs, while perhaps not provoking the same level of discussion and debate as class actions, have quietly become a dominant force in federal civil litigation. Indeed, one source reports that, for the first time, a majority of all pending civil cases in federal court—52%—were in MDLs in fiscal year 2018.<sup>37</sup> This is a huge development. The U.S. Judicial Panel on Multidistrict Litigation reports that 156,511

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31. See *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) (“[A]scertainability and a clear class definition allow potential class members to identify themselves for purposes of opting out of a class.”).

32. See FED. R. CIV. P. 23(e)(1).

33. See, e.g., *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010) (“[T]he District Court evaluates the agreement as a fiduciary for absent class members. The reason for judicial approval is to ensure that other unrepresented parties (absent class members) and the public interest are fairly treated by the settlement reached between the class representatives and the defendants.” (citations omitted)); 4 WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 13:40 (5th ed. 2011 & Supp. 2019) (“[T]he court’s role as fiduciary is primarily to ensure that the class’s own agents – its class representatives and class counsel – have not sold out its interests in settling the case.”).

34. FED. R. CIV. P. 23(e)(2).

35. See FED. R. CIV. P. 23(e)(5).

36. See FED. R. CIV. P. 23(c)(3).

37. Dave Simpson, *MDLs Surge To Majority Of Entire Federal Civil Caseload*, LAW360 (Mar. 14, 2019, 10:54 PM), <https://bit.ly/2FdxQfK>.



cases were pending in MDL actions as of September 30, 2018.<sup>38</sup> By June 19th of 2019, that number had fallen slightly to 141,721 pending actions.<sup>39</sup> By comparison, the Administrative Office of the United States Courts reported 339,313 total pending civil cases in federal courts in 2018.<sup>40</sup> This represents a tectonic shift in the processing of federal civil cases, so any discussion of U.S. collective actions would be incomplete without a brief note as to how MDLs work.

MDLs are a product of statute, rather than a procedural device available under the civil rules. 28 U.S.C. § 1407 created a seven-judge judicial panel on multidistrict litigation to administer the process. Under section 1407, when there are multiple civil actions on the same topic pending in different districts, the panel may consolidate and transfer the cases to a single district for coordinated pretrial proceedings before one judge. The MDL process may be initiated either by the judicial panel on multidistrict litigation acting *sua sponte* or by a party who believes that MDL treatment may be appropriate for their case.<sup>41</sup> Like class actions, the MDL process is designed to “promote the just and efficient conduct” of complex actions,<sup>42</sup> and all cases subject to an MDL order will be bound by the MDL judge’s rulings. But the MDL process is about coordination, so unlike class actions, MDL rulings do not bind non-parties. Each plaintiff must still file his or her own individual claim and the cases are simply consolidated for coordinated proceedings on the common pretrial issues. Also unlike class actions, the MDL process does not resolve the merits of the claims at issue. Instead, cases are consolidated only for pretrial proceedings. After resolving as many pretrial matters as possible, the transferee judge remands the cases to the districts in which they were originally filed. That’s where any further proceedings and final resolution take place.<sup>43</sup> Notably, though, the class action device is often used alongside an MDL. It is not uncommon to see claims that have been consolidated in an MDL also certified as a class as part of the MDL proceedings, and often for settlement purposes.<sup>44</sup>

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38. J.P.M.L., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION UNDER 28 U.S.C. § 1407 – FISCAL YEAR 2018, at 3 (2018), <https://bit.ly/2kPs4KR>.

39. J.P.M.L., MDL STATISTICS REPORT – DISTRIBUTION OF PENDING MDL DOCKETS BY DISTRICT 5 (2019), <https://bit.ly/2kkAFFc>.

40. Table C–U.S. District Courts – Civil Federal Judicial Caseload Statistics, U.S. CTS., <https://bit.ly/2lTV5FD>. (last visited Dec. 22, 2019).

41. 28 U.S.C. § 1407(c) (2012 & Supp. 2017).

42. 28 U.S.C. § 1407(a) (2012 & Supp. 2017).

43. *See id.*

44. *See* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1695–96 (2017).

### III. UK (ENGLAND AND WALES) CLASS ACTION SYSTEM

Next, I'll turn briefly to the collective action options that are available in England and Wales. Our systems are quite different, but there are some evident similarities. And, as I've noted, it seems that England has looked to, and moved toward, the U.S.-style class action—but with caution.<sup>45</sup> Understandably, England has sought to avoid what are considered some of the excesses of the U.S. class action system.<sup>46</sup> At the same time, however, England has not experienced some of the benefits accompanying a liberal, opt-out class action regime.<sup>47</sup> The Consumer Rights Act of 2015, and with it the creation of a collective action device, was potentially a step toward providing some of those benefits in the consumer/anti-competitive business context.<sup>48</sup> But a true English class action? As American lawyers and judges know it, it has yet to arrive.

#### A. “Traditional” Forms of Multi-Party Litigation

It is important to recognize that traditional forms of multi-party litigation remain a useful tool in England. Under English civil rules, any number of claimants or litigants may be joined as parties.<sup>49</sup> For example, in a 2005 case, 50,000 shareholders were joined together as full parties to the proceeding.<sup>50</sup> While we've used this same aggregation tool in the

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45. See Rachael P. Mulheron, *Some Difficulties with Group Litigation Orders – and Why a Class Action is Superior*, 24 C.J.Q. 40, 58 (2005) (“The class action device, as practised elsewhere . . . , seems to have been viewed with some trepidation by several senior English judiciary and academics alike . . . .”); see also Hensler, *supra* note 5, at 968 (“Because the modern class action was first adopted in the United States and because most jurisdictions that have adopted the class action in the last decade refer to the ‘American class action’ as a model, if not to emulate then to avoid, it is reasonable to view class actions outside the United States as ‘legal transplants.’”).

46. Neil H. Andrews, *Multi-Party Actions and Complex Litigation in England*, 23 EUR. BUS. L. REV. 1, 23 (2012) (“There are dangers in adopting an ‘opt out’ system: potentially aggressive attempts to bring collective litigation; the prospect of very large gains being made by law firms; the fear of commercial and public entities being exposed to expensive and protracted litigation; inevitable increases in the cost of potential defendants’ defensive measures; in particular, consumers and businesses paying more for insurance cover.”).

47. Mulheron, *supra* note 45, at 68 (“[T]he opt-out approach favoured by the great majority of class action regimes provides innumerable advantages that would further the [English Civil Procedure Rules’] overriding objective.”); see also Vicki Waye, *Advantages and Disadvantages of Class Action Litigation (And Its Alternatives)*, 24 NZBLQ 109, 109 (2018) (“Without an effective collective redress mechanism small claims may be uneconomical to pursue, those that cause mass harm thereby escape responsibility and scarce legal decision making resources are inefficiently deployed. Individualised legal determinations of similar matters can also lead to inconsistent outcomes, and consequently undermine the coherence and integrity of the justice system.”); Ng, *supra* note 10, at 54 (“In order to see an increase in collective actions by consumers, some type of class action has to exist.”).

48. See Consumer Rights Act 2015, c. 15, § 47 (UK).

49. See CPR 19.1 (UK); see also Andrews, *supra* note 46, at 14.

50. *Weir v. Sec’y of State for Transp.* [2005] EWHC (Ch) 2192 (Eng.).

United States,<sup>51</sup> a class action or multidistrict litigation is generally the preferred method when the number of litigants becomes unwieldy. In England, perhaps because turning to a different collective action procedure was not always possible, joinder procedures are more evolved. It is common for a joined group of claimants or defendants, such as the 50,000 shareholders I just noted, to form an action committee to coordinate litigation.<sup>52</sup> In a 2013 case, 104 claimants (represented by two law firms) joined together under a cooperation agreement to obtain a 52 million euro award.<sup>53</sup> Action committees and cooperation agreements are also common in formal collective actions in the United States, but are typically not seen in cases involving joinder alone.

So-called “test” cases, or bellwether trials, have also been a useful tool in England to produce “class-wide” *res judicata*.<sup>54</sup> Those are cases in which a single *A v. B* case is tried in order to test the viability of, and obtain judgment on, claims that are relevant to a group of litigants. Bellwether trials are common in the United States as well, but they are generally used in the context of formal collective actions. For example, there are currently bellwether trials scheduled in the opioid MDL pending in the Northern District of Ohio.<sup>55</sup>

#### B. Representative Actions

Representative actions are the original mechanism for formal group litigation in England. These actions were in use in England prior to the adoption of Rule 23 in the United States. The representative action procedure is codified in English Civil Procedure Rule 19.6. Under this Rule, where multiple claimants have the same interest, a claimant may act as a representative for others having the same interest.<sup>56</sup> Any judgment or order obtained when using this procedure is binding on all represented individuals, and it can be enforced by non-parties with permission of the court.<sup>57</sup> This procedure resembles a U.S. class action in that party claimants act on behalf of a class of non-party claimants, and the non-party claimants will be bound by the judgment. The procedure also includes a means by which non-party claimants may opt-out. Represented non-parties are automatically bound by any judgment or order, whether or not

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51. See FED. R. CIV. P. 19–20.

52. Andrews, *supra* note 46, at 13.

53. See Michael Brown & Elizabeth Clay, *The English Class Action?*, FINANCIER WORLDWIDE (Oct. 2015), <http://bit.ly/2keog5L>.

54. RACHAEL P. MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE* 102–03 (2004); Andrews, *supra* note 46, at 2–3.

55. Sarah Angelino & Stephen Copenhaver, *Why Bellwethers Matter in the Opioid MDL*, LAW360 (June 10, 2019, 1:53 PM), <http://bit.ly/2kynuAP>.

56. CPR 19.6 (Eng.).

57. See *id.*

they consent to the proceedings.<sup>58</sup> But they can opt-out if they believe the judgment or order should not be enforced against them by later petitioning the court.

Compared to the U.S. model, representative actions present some hurdles that have limited their effectiveness in practice.<sup>59</sup> First, the requirement that represented parties all share the “same interests” was construed very strictly in the 1910 King’s Bench ruling in *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.*<sup>60</sup> The holding of *Markt* still holds sway, to some extent, and thereby burdens the representative action procedure to this day.<sup>61</sup> In that case, it was held that the “same interests” requirement is satisfied only where the represented parties “enjoy[] *identical* contractual relationships created under the same commercial exercise that gave rise to a proportionate liability for a single identified loss.”<sup>62</sup> The Court specifically held that the “same interest” requirement is not satisfied where different defenses may exist.<sup>63</sup> “Although the modern trend is to give the rule an increasingly liberal interpretation,”<sup>64</sup> even relatively recent cases have emphasized the need for “identity of interest.” Those cases have rejected a representative action where different defenses applied to the claims of represented parties, concluding that claimants do not have the same interest where “the claim is not equally beneficial to all members of the class” because some claims are limited by the defendant’s ability to raise a defense.<sup>65</sup> This narrow interpretation stems from two concerns: binding non-parties who do not have an opportunity to litigate on their own; and prejudicing defendants who could be prevented from raising a defense that would bar claims by some represented individuals.<sup>66</sup> Although the U.S. class action system has similarly faced issues of unique individual interests or individual defenses arising in what are otherwise common claims, the flexibility of Rule 23 has generally resolved these issues through creation of subclasses or class actions that are limited to

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58. See MULHERON, *supra* note 54, at 92–93; Andrews, *supra* note 46, at 14.

59. See Andrews, *supra* note 46, at 14–15 (explaining that “representative proceedings remain distinctly marginal in England” and “[i]t is very rare for English representative proceedings to culminate in a damages award in favour of the represented class”).

60. See *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.* [1910] 2 KB 1021 at 1039 (Moulton LJ) (appeal taken from Eng.).

61. 7 CHRISTOPHER HODGES & STEFAAN VOET, DELIVERING COLLECTIVE REDRESS: NEW TECHNOLOGIES 50 (2018).

62. *Emerald Supplies Ltd. v. British Airways PLC* [2010] EWCA (Civ) 1284 [48] (Eng.) (emphasis added); see also *Markt & Co. Ltd.* [1910] 2 KB at 1026.

63. See *Markt & Co. Ltd.* [1910] 2 KB at 1030.

64. See *Emerald Supplies Ltd.* [2010] EWCA (Civ) at 1284 [4].

65. *Id.*

66. *Id.*; see also *Markt & Co. Ltd.* [1910] 2 KB at 1039.

only certain issues. The rigidity of English representative actions has stood in the way of such accommodative procedures.<sup>67</sup>

An example of this limitation on the representative action played out recently in a case filed against Google. An advocacy group filed an action on behalf of 4.4 million UK iPhone users, based on an alleged privacy violation on the part of Google.<sup>68</sup> The damages alleged were 1 to 3 billion pounds.<sup>69</sup> On August 10, 2018, the High Court dismissed the action, concluding in part that “a representative action would not be legitimate because those claimants who have suffered ‘damage’ would have different interests from one another, dependent on the individual facts of their case.”<sup>70</sup> The court went on to note that “the individual claims are not viable as stand-alone litigation, and [other forms of collective relief are] impracticable, so that this representative action is in practice the only way in which these claims can be pursued.”<sup>71</sup> Based on a strict application of the same-interest rule, the 4.4 million iPhone users were left without an opportunity for collective redress, despite the fact that the alleged violation by Google was committed in exactly the same way as to each user. As stated by the attempted representative party: “There now seems no alternative but for the government to fill this gap by legislating to give groups of consumers the right to affordable collective redress.”<sup>72</sup>

Second, a significant hurdle for many potential claimants is that the representative party in a representative action must alone bear all of the costs of litigation, including fee-shifting if the representative party loses.<sup>73</sup> Having to personally bear costs plainly discourages someone from taking on what could be burdensome litigation on behalf of non-parties who are otherwise represented. These non-parties essentially enjoy a free-ride on the representative’s time and financial investment.<sup>74</sup> This is especially problematic in consumer cases where each individual claimant’s damages are small and therefore no claimant is sufficiently motivated to bring a claim in the face of the cost and risk of litigation.<sup>75</sup> In U.S. litigation, we

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67. See FED. R. CIV. P. 23(c)(4) (“When appropriate, an action may be brought or maintained as a class action with respect to particular issues.”); see also FED. R. CIV. P. 23(c)(5) (“When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.”); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 184 (1974) (Douglas, J., dissenting in part) (“The purpose of Rule 23 is to provide flexibility in the management of class actions, with the trial court taking an active role in the conduct of the litigation.”).

68. See *Lloyd v. Google LLC* [2018] EWHC (QB) 2599 [2], [4] (Eng.).

69. *Id.* at [4].

70. *Id.* at [89].

71. *Id.* at [103].

72. Alex Hern, *UK High Court Blocks Mass Privacy Action Against Google*, *GUARDIAN* (Oct. 8, 2018, 9:47 AM), <https://bit.ly/2yavCL8>.

73. See Andrews, *supra* note 46, at 16.

74. See Brown & Clay, *supra* note 53.

75. See, e.g., *Emerald Supplies Ltd. v. British Airways PLC* [2010] EWCA (Civ) 1284 [5] (Eng.) (“Consumer claims for overcharging are given as an example of a case in

call these “negative-value” suits because the cost of investigating the harm and seeking legal redress is higher than any potential recovery.<sup>76</sup> As my friends Professor Issacharoff and Dean Klonoff have written, “the most important element in ensuring justice is making sure that some agent – dare we say, any agent – will rise to the occasion to take up the case.”<sup>77</sup> Given the risks involved for a representative under the English system, this key step is unlikely to occur.

### C. *Group Litigation Orders*

To remedy some of the restrictive characteristics of representative actions and create something that more closely resembles a U.S. class action, England introduced Group Litigation Orders (“GLO”) in 2000, codified at Civil Procedure Rule 19.10.<sup>78</sup> Since that time, Group Litigation Orders have been the primary tool for bringing collective actions.<sup>79</sup>

“The key features and normal effect of any GLO,” as the device is known, have been described as follows:

- it identifies the common issues which are a pre-condition for participation in a GLO;
- it provides for the establishment and maintenance of a register of GLO claims;
- it gives the managing court wide powers of case management, including the selection of test claims and the appointment of a lead solicitor for the claimants or the defendants, as appropriate;
- it provides for judgments on test claims to be binding on the other parties on the group register; and
- it makes special provision for costs orders.<sup>80</sup>

Unlike representative actions, the GLO system is an opt-in system in which each member of the group is a party to the proceedings and must prove individual loss.<sup>81</sup> In that way, the GLO regime resembles MDL

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which each person’s damage is small, but a representative action may not be very useful: although many people are affected by legal wrongdoing, that may not be to a sufficient extent to motivate any one of them to commence an action against the wrongdoers.” (citation omitted)).

76. See, e.g., John C. Coffee, Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 U. PA. L. REV. 1895, 1900–01 (2017).

77. Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1186 (2009).

78. Ng, *supra* note 10, at 52.

79. See Andrews, *supra* note 46, at 21.

80. *Autologic Holdings PLC v. Comm’rs of Inland Revenue* [2005] 3 CMLR 2 [86] (Eng.); see also Andrews, *supra* note 46, at 21–22.

81. See Andrews, *supra* note 46, at 22.

practice in the U.S.<sup>82</sup> The opt-in GLO system eliminates some of the concerns underlying the “same interest” representative action requirement because there is no risk of binding unknowing non-parties to the judgment. Also, defendants will be able to raise any applicable defenses against each claimant. Accordingly, claims governed by a GLO need only “give rise to common or related issues of fact or law.”<sup>83</sup> The opt-in system also allows for costs to be shared across the group, which helps to relieve the cost–benefit problem attendant to representative actions.<sup>84</sup>

GLOs do have their drawbacks. Any opt-in system has its limitations.<sup>85</sup> There can be no global peace following such a collective action because potential claimants who choose not to opt in are always free to pursue their individual claims.<sup>86</sup> And because individuals can choose to pursue their own claims, the efficiency purposes of collective actions are limited. Thus a GLO does not eliminate the need for repetitious actions.<sup>87</sup> Further, an opt-in procedure requires claimants to take affirmative steps to obtain relief—steps the claimant may be unable or unwilling to take for many of the same reasons that a claimant may decline to take individual action.<sup>88</sup> So access to justice is limited by an opt-in class device.

While the GLO option provides for more liberal group litigation than does a representative action, and is in fact the primary collective action tool in England and Wales, in practice it has not been employed nearly as often as the U.S. class action. Not even close. As of May 2018, there had been only 105 GLOs in the 18 years since the procedure was introduced.<sup>89</sup> Compare that with the rate of putative class action filings in the United

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82. See Hensler, *supra* note 5, at 979–80 (noting that GLOs in England “play[] a similar role” to MDLs).

83. CPR 19.10 (Eng.).

84. See Andrews, *supra* note 46, at 21.

85. See Estelle Hurter, *Opting in or opting out in class action proceedings: from principles to pragmatism?*, 50 DE JURE 60, 74 (2017), <https://bit.ly/2kMHS11> (“[O]pt-in regimes do not promote inclusivity, and an under-inclusive class does not ensure access to justice for all of the individuals who fall within the class definition.”).

86. See Mulheron, *supra* note 45, at 54–55 (“[U]nder an opt-in regime, the defendant loses some degree of comfort in knowing how many of these individual proceedings it is possible to face.”).

87. *Id.* at 54 (explaining that “[a] multiplicity of litigation is not necessarily avoided” in GLO proceedings); see also Ng, *supra* note 10, at 55 (noting that opt-out systems have a much higher participation rate than opt-in systems).

88. See Mulheron, *supra* note 45, at 54 (“[T]here are various barriers, whether they be economic (*e.g.* too poor to afford any legal assistance), psychological (*e.g.* afraid of backlash from the defendant if one is seen to join a group action) or social (*e.g.* immigrants with a poor knowledge of English or of English legal systems), that discourage or prevent affirmative action being taken to opt in.”); see also Waye, *supra* note 47, at 116 (“There is little incentive for claimants with small claims to initiate an individual claim or to join the GLO register where the costs of taking such action outweigh the value of their claim.”).

89. *Guidance: Group Litigation Orders*, GOV.UK, <https://bit.ly/2kEy759> (last updated Dec. 26, 2019).

States, where in 2018 alone—and only in the field of federal securities litigation—403 class actions were filed.<sup>90</sup> Between state and federal court, the total number of putative class actions filed in the U.S. since 2000 likely falls somewhere in the tens of thousands.<sup>91</sup> The relatively low number of GLOs could be due in part to the extensive case management required in a GLO, including the need for initial ratification by the court.<sup>92</sup> But to the extent the low number of GLOs indicates that consumers and other injured parties are not generally able to secure relief on a class-wide basis,<sup>93</sup> it could be argued that the GLO procedure has serious deficiencies.<sup>94</sup>

#### D. *Competition Appeal Tribunal Collective Proceedings*

The newest form of collective action in England and Wales—and the form that most closely resembles a U.S.-style class action—is the collective proceeding before the Competition Appeal Tribunal, which I will refer to as a “CAT” collective action. The CAT collective action was introduced in Section 47 of the Consumer Rights Act of 2015.<sup>95</sup> Although CAT collective actions may be either opt-in or opt-out at the discretion of the Competition Appeal Tribunal, the CAT procedure provides the first English opt-out class action device with class-wide relief and the opportunity for class-wide aggregate damages.<sup>96</sup> Unlike the U.S. class action system, however, CAT collective actions can be used only for the limited purpose of challenging anti-competitive conduct under the Competition Act of 1998.<sup>97</sup> And, as indicated by the name, such collective proceedings may be adjudicated only before the Competition Appeal Tribunal.<sup>98</sup>

90. *Clearinghouse Filings 1996–YTD*, *supra* note 7.

91. *Cf.* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 816–30 (2010) (identifying 688 federal class action settlements in 2006 and 2007). *See generally* Jonah B. Gelbach & Deborah R. Hensler, *What We Don't Know About Class Actions But Hope to Know Soon*, 87 FORDHAM L. REV. 65 (2018) (describing ongoing efforts to calculate the total number of class actions annually).

92. *See* CPR 19.11 (Eng.); *see also* Andrews, *supra* note 46, at 16.

93. *See* Andrews, *supra* note 46, at 24 (“The English GLO figures (an ‘opt in’ system) are perhaps disconcerting if one takes an absolutist approach to ‘access to justice.’”); *see also* Ng, *supra* note 10, at 52 (explaining that “[t]he opt-in requirement attached to GLOs means that they are unlikely to be used for cases involving mass consumer losses where individuals face significant barriers to ‘opting-in’”).

94. *See* Mulheron, *supra* note 45, at 40 (“[T]he opt-in approach adopted by the GLO regime is less than satisfactory, is wasteful of litigants’ resources, and is beset with problems.”).

95. Consumer Rights Act 2015, c. 15, § 47 (UK).

96. *See* Rachael P. Mulheron, *The United Kingdom’s New Opt-Out Class Action*, 37 OXFORD J. LEGAL STUD. 814, 816 (2017).

97. Competition Act 1998, c. 4, § 47A(2) (UK); *see also* Mulheron, *supra* note 96, at 816.

98. Competition Act 1998, c. 4, § 47A(1) (UK).



CAT collective actions may be brought by either a class member who acts as a class representative or by what is called an “ideological claimant” who is not a class member but is otherwise a suitable representative.<sup>99</sup> This is in part based on the fact that CAT collective actions arise in the context of anti-competition laws. UK lawmakers wanted to include as potential representatives trade associations and consumer associations that already represent consumers and are well-positioned to assert claims arising under the Competition Act.<sup>100</sup> The “ideological claimant” serves a purpose similar to a U.S. plaintiff with organizational standing in that the ideological claimant, while not having its own claim, has some direct interest in the class proceedings due to its association with the individuals who do have claims.<sup>101</sup>

A CAT collective action begins with a “collective proceeding order” from the Competition Appeal Tribunal.<sup>102</sup> Much like class certification in the U.S., the Tribunal looks to various factors to determine whether the action is appropriate for collective treatment. Specifically, the Tribunal considers whether there is commonality between the class claims, whether a collective proceeding is superior to other procedures, and whether there is minimum numerosity.<sup>103</sup> The Tribunal also looks to the preliminary merits of the claim, the costs and benefits of bringing the claim as a collective action, whether there is an adequate class definition, the need for collective treatment, the general suitability of the case for collective treatment, and the appropriateness of the representative claimant.<sup>104</sup>

Although most of these factors largely resemble the factors considered for class certification in the U.S., the consideration of the preliminary merits of the claim, in particular, may provide a degree of scrutiny not present in the U.S. class certification process.<sup>105</sup> In the United States, the certification process is only a procedural step to determine whether it is appropriate to apply the class action device. The merits of the action are another matter. The merits of a claim may have some limited relevance in the U.S. certification process,<sup>106</sup> but a discussion of that would get too “into the weeds” for our purposes today. Suffice it to say that the

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99. Competition Act 1998, c. 4, § 47B(8) (UK).

100. See Mulheron, *supra* note 96, at 829.

101. For one example, see *Dorothy Gibson v. Pride Mobility Prods. Ltd.* [2017] CAT 9 (Eng.), where an ideological plaintiff—the General Secretary of the National Pensioners Convention—brought a putative CAT collective action on behalf of seniors injured by anti-competitive practices related to mobility scooters.

102. Competition Act 1998, c. 4, § 47B(4) (UK).

103. See Mulheron, *supra* note 96, at 822–23.

104. See *id.*

105. See *id.* at 833–34.

106. See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008) (“[T]he court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits – including disputes touching on elements of the cause of action.”).

merits alone are not a valid consideration in the U.S.<sup>107</sup> As stated by one UK class action expert, the goal of the CAT preliminary merits consideration is to go beyond the normal standard for dismissal and target “cases which are weak, but not so weak that they could be struck out.”<sup>108</sup> In one case, the CAT explained that the class representative “had to do more than simply show that he has an arguable case on the pleadings.”<sup>109</sup>

While the CAT certification criteria could help to ensure that only proper, strong claims are certified for class treatment, and thereby avoid some of the abuses of the U.S. system, they have thus far been applied so strictly that, at last check, no collective proceeding order has yet been issued. Indeed, the Competition Appeal Tribunal has considered only two cases for certification.<sup>110</sup> So while the CAT collective action appeared to be a promising method of securing some of the benefits of a U.S.-style class action, these benefits seem far from being realized.

But things may be changing. In April of 2019, the English Court of Appeal overturned the Competition Appeal Tribunal’s refusal to certify a claim and grant a collective proceedings order in a collective action claim against Mastercard.<sup>111</sup> One critic argued that the Court of Appeal went too far in weakening the certification requirements for a CAT collective action. She explained that “[i]f the appellate decision in the Mastercard case is allowed to stand, the UK will have a system that is as bad, if not worse, than the American system.”<sup>112</sup> The UK Supreme Court has since agreed to hear Mastercard’s appeal. The proper test for CAT collective action certification— and perhaps the practical viability of a CAT collective action—hangs in the balance.

#### IV. CHALLENGES FACED IN U.S. SYSTEM

By this point, I hope I’ve been clear that England has been cautious in adopting aggregation procedures. Our friends here continue to look upon the U.S. model with some suspicion. And that approach is probably

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107. See *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) (“Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.”); see also *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974) (“We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit, in order to determine whether it may be maintained as a class action.”).

108. Mulheron, *supra* note 96, at 834.

109. *Walter Hugh Merricks CBE v. Mastercard Inc.* [2017] CAT 16 [57] (Eng.).

110. See *id.*; see also *Dorothy Gibson v. Pride Mobility Prods. Ltd.* [2017] CAT 9 (Eng.).

111. See Stephen Wisking et al., *Court of Appeal Overturns CAT’s Refusal to Certify the MasterCard Collective Action Claim*, LEXOLOGY (Apr. 24, 2019), <http://bit.ly/2UCAAB>.

112. Lisa A. Rickard, *Mastercard: Preventing a US-Style Litigation Monster*, LAW SOC’Y GAZETTE (July 3, 2019), <http://bit.ly/2kezqr2>.

wise. There are aspects of the U.S. model to be avoided. But as England seeks to enhance the benefits of aggregation by introducing procedures that are increasingly similar to the U.S. collective action approach, the country also opens the door to expanded (and sometimes abusive) litigation. Having observed the U.S. class action system as it has developed over a good many years, and having participated in that development as a judge, I have some familiarity with the most problematic elements of the system—and with its substantial benefits. Based on our experience in the U.S., I see a few specific problems that English courts and practitioners should try to avoid. The U.S. experience offers valuable lessons, including lessons in what to avoid, and lessons in how to mitigate certain excesses. In the next few minutes, I will review five challenges we have faced in the U.S. system, and I'll suggest how England might avoid them.

#### A. *Objectors*

First, I turn to the issue of objectors to class action settlements. To repeat, parties to a class action may submit a settlement proposal and, under Rule 23(e), “any class member may object to the proposal.”<sup>113</sup> This procedure is necessary because non-named class members are bound by the settlement; they must have some opportunity to contest it.<sup>114</sup> For the same reason, non-party objectors can also appeal a District Court’s judgment approving a settlement.<sup>115</sup> As such, objectors are not inherently problematic and can, in fact, be an asset to the class system by ensuring that settlements are fair and adequately protect unnamed class members.<sup>116</sup> But where there are objections, the judge overseeing the action must invest additional time in hearings to determine if there is merit to the objections, and such hearings necessarily add weeks—or even months—to the approval process. Similarly, an appeal of a class settlement, even where

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113. FED. R. CIV. P. 23(e)(5)(A).

114. *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) (“What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing. To hold otherwise would deprive nonnamed class members of the power to preserve their own interests in a settlement that will ultimately bind them, despite their expressed objections before the trial court.”).

115. *See id.* at 10–11 (“[A]ppealing the approval of the settlement is petitioner’s only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate.”).

116. *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 408–09 (2003) (“By definition, the objector is a monitor, who is evaluating a proposed settlement and then investing resources to either improve the settlement terms or reject the settlement. . . . Objectors create an adversary contest, usually regarding the difficult process of settlement approval, and thereby can perform a positive function.”).

meritless, can add months or years to litigation, during which time payment to the class and class counsel is delayed.

This has led one academic to note that “objectors may be the least popular litigation participants in the history of civil procedure.”<sup>117</sup> In fact, they have been described as “warts on the class action process.”<sup>118</sup> I attended a symposium a few years ago where one of the speakers, a lawyer involved in the massive NFL concussion litigation, referred to objectors as “scum.” And as another critic has put it: “Objectors are as welcome in the courtroom as is the guest at a wedding ceremony who responds affirmatively to the minister’s question, ‘Is there anyone here who opposes this marriage?’”<sup>119</sup>

But whether or not objectors are widely appreciated, the real problem for courts and class litigants arises with so-called “professional objectors.”<sup>120</sup> In the U.S. system, these are attorneys who routinely “oppose settlements on behalf of nonnamed class members and threaten to file meritless appeals of the final judgment merely to extract a payoff.”<sup>121</sup> The delay accompanying an objection produces a powerful incentive for class counsel to take steps to appease an objector, regardless of the merits of the underlying objection. Knowing this, professional objectors look for a quick payout.

Professional objectors free-ride on the efforts of class counsel, who have invested substantial time and effort in successfully identifying a legal claim and procuring a settlement,<sup>122</sup> by extorting payments from class counsel to avoid the delay and expense of an objection.<sup>123</sup> After the objectors receive their payout, they do not file the threatened objection or appeal, or, where already filed, withdraw the objection or appeal. This sort of objection adds little or nothing to the fairness of the class action process—indeed, it raises serious questions about the efficiency and integrity of the process. It also carries the potential to discourage lawyers from initiating class actions and investing the effort necessary to reach settlement, because they know that others who stood on the sidelines are likely to get a piece of the settlement they worked to procure.<sup>124</sup>

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117. *Id.* at 411.

118. *Id.*

119. Lawrence W. Schonbrun, *The Class Action Con Game*, REG., Fall 1997, at 50, 53, available at <https://bit.ly/2EPlw5A>.

120. Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 375 (2003) (defining “professional objectors” as “a term used colloquially to describe plaintiffs’ law firms that threaten objections largely as a means to obtain side payments for themselves in exchange for their agreement either to drop the objections or not to raise them in the first place”).

121. John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them?*, 39 FLA. ST. U. L. REV. 865, 865–66 (2012).

122. See Brunet, *supra* note 116, at 409.

123. See Lopatka & Smith, *supra* note 121, at 865–67.

124. See Brunet, *supra* note 116, at 431–32.

U.S. courts have also encountered cases in which the objection filed is actually (or potentially) meritorious, but the person raising it has the intent of merely extracting a payout from class counsel. Clearly, the meritorious objection has not been used properly: The objector is not motivated by a desire to benefit the class. For example, a potential objector who has identified a genuine problem with a settlement may approach class counsel prior to filing any objection in court, seeking a payout in exchange for not lodging the objection.<sup>125</sup> A court can't consider an objection that is never filed, and so a meritorious issue may evade review with the result being approval of an unfair settlement.<sup>126</sup> Similarly, if an objector does in fact file a meritorious objection or appeal, but later withdraws the claim, a court may never reach the merits of the issue. In these instances, objections are not serving their proper purpose of benefitting the class. They are, instead, being used solely for the benefit of the objecting attorney.

Objecting can be lucrative. In one recent case, class counsel reports that he paid a well-known serial objector \$225,000 *after* his objection was overruled.<sup>127</sup> Quite simply, class counsel just wanted the objector to “go away” and not hold up the settlement by taking an appeal.<sup>128</sup> And by the way, that objector is said to have filed 76 objections to class action settlements over the years.<sup>129</sup>

A significant problem for both judges and class counsel in taking on improper objectors is that there may be no evidence of impropriety on the record. Some potential objectors contact class counsel informally and threaten to raise an objection unless counsel provides a payout. Even where an objection is actually filed, it is generally difficult to determine whether an objection is intentionally baseless and improper, rather than simply weak.<sup>130</sup> One reason is that filed objections can be general. Such “cookie cutter” objections will apply to any class settlement, such as an objection that the attorney fee award in the settlement is too high or that the total fund and per-class-member distributions are too low.<sup>131</sup> There is often insufficient evidence in the record to determine the intent of the attorney filing the objection.<sup>132</sup> And even routine objectors will sometimes file a meritorious objection that adds value to the process, so the fact that someone is a serial objector does not by itself mean that the objections are

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125. See Lopatka & Smith, *supra* note 121, at 882–83.

126. See *id.*

127. Michael J. Bologna, *Notorious “Serial Objector” May Have Filed His Last Objection (1)*, BLOOMBERG L. (Mar. 12, 2019, 8:42 AM), <https://bit.ly/2sSYUym>.

128. See *id.*

129. See *Serial Objector Index BETA*, SERIAL OBJECTOR INDEX, <http://bit.ly/2kigGXO> (last visited Sept. 21, 2019).

130. Lopatka & Smith, *supra* note 121, at 874–75.

131. See *id.* at 879.

132. See *id.* at 874–75.

baseless.<sup>133</sup> These factors make it difficult to regulate professional objectors because genuine objectors are a key part of the class action process, and it can be difficult, at least at first, to spot the difference between a baseless, extortionate objection and a genuine, but ultimately unsuccessful, objection. But what must be kept in mind is that an objection—whether extortionate or genuine—slows the process. And time means money.

As far as I know, England does not have a documented history of “professional objectors.” But the collective action system here, in its existing form, is not immune to the problem. Class litigators and the judiciary need to be on-guard against this form of abuse. The problem is most likely to arise in the new CAT proceedings because, under CAT procedures, class members have the right to object to a settlement.<sup>134</sup> As in the U.S., this objection procedure can in many ways ensure the fairness of a settlement. And, because England has not yet witnessed a certified CAT class, the procedure has not progressed to settlement, where objectors might have their day in court. But given the potential for abuse, English jurists and practitioners would be well-advised to consider adopting procedures that safeguard the settlement process generally and protect it against manipulative objections, in particular.

In the U.S., various options have been proposed to curb abusive objections. In fact, Rule 23 was amended at the end of 2018 with the hope of curtailing the practice, if not eliminating it entirely. The amended Rule includes two new procedures. First, the Rule is amended to require that any objections be stated with specificity.<sup>135</sup> The Civil Rules Committee explained that this change will “enable the parties to respond to [the objections] and the court to evaluate them.”<sup>136</sup> This should help to prevent professional objectors from filing generic objections without establishing specific grounds arising out of the settlement at issue.

Second, under the amendment, “[u]nless approved by the court after a hearing, no payment or other consideration may be provided in connection with: (i) forgoing or withdrawing an objection, or (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.”<sup>137</sup> As explained by the Rules Committee:

[S]ome objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors – or their counsel – have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments

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133. *See id.* at 875.

134. *See* Competition Appeal Tribunal Rules 2015, SI 2015/1648, art. 94(7) (Eng.).

135. *See* FED. R. CIV. P. 23(e)(5)(A).

136. FED. R. CIV. P. 23 advisory committee’s note to 2018 amendment.

137. FED. R. CIV. P. 23(e)(5)(B).

approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes. The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern.<sup>138</sup>

By requiring court approval for any payment associated with withdrawing an objection or appeal, the amended rule will help to prevent extortionate payments and avoid the inappropriate withdrawal of meritorious objections or appeals. And by simply bringing objection side-deals into the open, the amended rule may go a long way toward discouraging professional objectors.<sup>139</sup> Preemptively adding similar requirements to England’s CAT collective action procedure could help to avoid the professional objector phenomenon altogether.

Among other proposals that have been put forth in the U.S.—and that may merit consideration in England and Wales—imposing an appeal bond on non-party objectors to cover the costs of the appeal as well as the costs of delaying settlement is one option. (Full disclosure: Professor John Lopatka and I have written an article making that proposal.<sup>140</sup>) Still other proposals include adopting an inalienability rule under which objectors are prohibited from voluntarily settling their appeals,<sup>141</sup> inserting “quick-pay” provisions in class settlement agreements so that class counsel and class members are not burdened by the cost of delay,<sup>142</sup> expediting the appellate process for non-party objector appeals,<sup>143</sup> imposing sanctions on professional objectors,<sup>144</sup> or prohibiting side deals altogether.<sup>145</sup> While each of these options seems to have advantages, each also raises concerns that have been discussed at length in U.S. class action literature.

The approach that recently took effect is a middle ground that preserves the ability for both meaningful objection and withdrawal of objections where appropriate, while also taking steps toward discouraging the professional objector. It is way too early to judge how far the amendments will go in resolving the professional objector problem, but it

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138. FED. R. CIV. P. 23 advisory committee’s note to 2018 amendment.

139. See Brunet, *supra* note 116, at 446.

140. See Lopatka & Smith, *supra* note 121, at 929.

141. See Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1659–66 (2009).

142. See *id.* at 1640–41.

143. See Lopatka & Smith, *supra* note 121, at 901–02.

144. See *id.* at 896.

145. See Bologna, *supra* note 127 (“The only way to stop this is to prohibit all side deals – *all side deals* . . . . If the objectors know they can’t get a side deal, they won’t try to blackmail class counsel. This way the only people objecting are people who have a real beef with the settlement.” (internal quotation marks omitted)).

is difficult to see how the measures cannot at least enhance the integrity of the class action settlement process.

*B. Collusion Between Class Representatives/Counsel and Defendants*

A second, but complementary, issue in U.S. class actions is the problem of collusion between class representatives and class counsel and defendants and their counsel, almost always to the detriment of non-party class members.<sup>146</sup> Because it is the colluding parties who are presenting the court with the proposed settlement, no one then before the court has the incentive to raise concerns about the fairness to absent class members of that settlement.<sup>147</sup> This points to why the ability to make meritorious objections—something I’ve already talked about—is necessary. It is essential that the named parties have some degree of accountability to the class members given the representative nature of the proceedings.<sup>148</sup> But objections are not always enough, which has led the U.S. judicial and legislative branches to take a number of steps aimed at preventing collusive practices in class action settlements.

One of the important benefits of a well-developed collective action system is that such a system allows individuals with low-value claims to have their claims processed in a cost-effective way. But this often means that individual class members don’t have much “skin in the game.” They have little to gain and little to lose. As the Third Circuit has explained, this situation creates “a concern that those actions are brought primarily to benefit class counsel,”<sup>149</sup> who recover fees that eclipse a class member’s individual award amount by multiple magnitudes.

Where the attorneys are more invested in the outcome of a lawsuit than are their clients, a perverse incentive arises for the attorneys to settle

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146. See *Waye*, *supra* note 47, at 112 (“Critics claim that class action settlements in the United States are often the product of collusion between defendants and class action attorneys seeking to profit at the expense of class members.”).

147. See Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 48–49, 50 n.66 (2002) (“[T]he settling defendant and class attorney . . . obviously have no interest in meaningful inquiries.”); see also Estelle Hurter, *Class Action Settlements: Issues and Importance of Judicial Oversight*, 51 COMP. & INT’L L.J. S. AFR. 97, 99 (2018) (“Because the absent [class] members are not before court and reliance is placed on the representative to act in their best interests, a further question for consideration is whether the settlement benefits all members equally (or at all).”).

148. See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 780 (2013) (“Because class actions are representative actions, ‘adequacy’ is the glue that holds a class together and ensures due process for absent class members. The system breaks down – and potential due process issues arise – if either the class representative or class counsel is incompetent, suffers from a conflict of interest, fails to assert claims with sufficient vigor, or suffers from other flaws that will detract from a full presentation of the merits.”).

149. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 179 (3d Cir. 2013).



the case to their own benefit with little regard for the benefit to the class. As Second Circuit Judge Friendly once explained, the attorney has “every incentive to accept a settlement that runs into high six figures or more regardless of how strong the claims for much larger amounts may be . . . . [A] juicy bird in the hand is worth more than the vision of a much larger one in the bush.”<sup>150</sup> For example, where a settlement directs that attorney fees will come out of the class common fund award, the pecuniary interests of the class and class counsel are directly at odds. In other cases, class counsel may agree to accept a low settlement offer in exchange for the defendant’s agreeing not to object to counsel’s fee proposal.<sup>151</sup> As one court has explained it, “lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.”<sup>152</sup>

One egregious, and much too common, example of this problem arose in the form of so-called “coupon settlements.” In a coupon settlement, class members receive no more than a discount in purchasing a new product from the very defendant vendor or manufacturer who has been sued and wishes to settle.<sup>153</sup> The coupon is in lieu of a direct monetary payment. Yet while class members have received only a coupon, class counsel obtain cash payment for their attorney fees—often based on the total value of the coupons—whether or not class members ever redeem them. As explained by Congress, “[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value.”<sup>154</sup>

One example is a 1995 class action in the Third Circuit involving defects in GM truck fuel tanks.<sup>155</sup> Class counsel negotiated a settlement under which class members received only a coupon for \$1,000 that they could apply to the purchase of a new truck. The total price of a new truck, to which the coupon would apply, was estimated at between \$20,000 and \$33,000, and the coupons expired after 15 months.<sup>156</sup> Of course, the coupons could be used by only those class members who had tens of thousands of dollars available to pay the balance of the purchase price.<sup>157</sup>

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150. *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting).

151. See Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 473–74 (2000).

152. *Weinberger v. Great Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991).

153. See Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor’s Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1344 (2005).

154. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4–5 (codified as amended at 28 U.S.C. §§ 1332(d), 1453, and 1711–15 (2005)).

155. See *generally In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

156. See *id.* at 808.

157. See *id.*

Other class members would receive no real value, and the settlement did nothing to resolve the safety concern with the defective fuel tanks.<sup>158</sup> Further, even where class members did successfully use the coupons, that use was a real benefit to the defendant truck manufacturer because class members were ultimately returning to that manufacturer and spending tens of thousands of dollars over the amount of the coupon.<sup>159</sup> Despite these obvious problems with the settlement, the District Court both approved it and granted class counsel a fee award of \$9.5 million—an award our Court called “unusually large in light of the fact that the settlement itself offered no cash outlay to the class.”<sup>160</sup> On appeal, in an opinion written by my late, great colleague and friend, Judge Ed Becker, the Third Circuit reversed, vacating approval of the settlement and remanding for further proceedings.<sup>161</sup>

While I’m not aware of coupon settlements or similar abusive practices taking hold in England and Wales, they are certainly something to be avoided. GLOs have some built-in protections against collusion between named plaintiffs and defendants because all class members are effectively named plaintiffs in GLOs. Represented parties in a representative action also have some protection in that they can retroactively opt-out of the class by demonstrating that representation was inadequate.<sup>162</sup> Notably, in the UK Google representative action I mentioned earlier that was rejected in part based on the “same interest” test, the Court provided an additional basis for rejecting the representative format.<sup>163</sup> It stated flatly that “[t]he main beneficiaries of any award at the end of this litigation would be the funders and the lawyers, by a considerable margin.”<sup>164</sup> That’s certainly a positive indication that English judges will be considering whether an award ultimately benefits the class, or only the attorneys, when deciding whether to approve a representative action.

Still, the lack of court involvement in settlement under both the representative action and GLO collective action regimes does present a situation where collusion may go uncorrected. Settlement offers in a GLO need not be judicially approved,<sup>165</sup> and courts are generally not required to

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158. *See id.* at 808, 819.

159. *See id.* at 808.

160. *Id.* at 810.

161. *See id.* at 822–23.

162. *See* Neil H. Andrews, *Multi-Party Litigation in England 5* (Univ. of Cambridge Faculty of Law, Research Paper No. 39/2013, 2013), <https://bit.ly/2IPRlot> (explaining that represented parties can also “secede from the main group” if they are “discontent with the manner in which the proceedings are being conducted by the head representative”).

163. *See supra* text accompanying notes 68–72.

164. *Lloyd v. Google LLC* [2018] EWHC (QB) 2599 [102] (Eng.).

165. MULHERON, *supra* note 54, at 102.

give approval prior to settlement in a representative action.<sup>166</sup> With little or no court oversight of the settlement process, a settlement that primarily benefits counsel *is* possible—and it should be guarded against. Under the CAT collective action regime, judicial approval of a settlement is required<sup>167</sup> and may help to guard against collusion. Such judicial supervision and approval is the first line of defense against abusive settlements. Even so, as reflected in the U.S. coupon settlement example, judicial supervision is no guarantee against collusive settlements. So even as to the CAT system, it may be helpful for England to reflect on some of the additional steps we have taken in the U.S. to prevent improper settlements and address coupon settlements in particular.

As criticism of coupon settlements grew in the U.S., Congress took concrete action. In the Class Action Fairness Act of 2005 (“CAFA”),<sup>168</sup> Congress heightened the level of judicial scrutiny to be applied to coupon settlements and limited attorney fees that could be awarded for such settlements, attacking the source of the collusive settlement problem. First, as to judicial scrutiny, Congress specified that for a “proposed settlement under which class members would be awarded coupons, the court may approve the settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members.”<sup>169</sup> Second, Congress required that, where there is a coupon settlement, attorney fees based on the award of coupons “shall be based on the value to class members of the coupons that are redeemed.”<sup>170</sup> Gone are the days when attorney fees were untethered from any benefit class members derived from effectively unredeemable coupons. As one pre-CAFA report indicated, “[t]he single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society.”<sup>171</sup> The CAFA, then, was a substantial step toward aligning the interests of class counsel and class members, at least as to coupon settlements.

As I’ve explained, the objector system in the U.S. also provides an avenue for addressing the collusion problem because absent class members can oppose an unjust settlement proposal and assert their

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166. Andrews, *supra* note 162, at 4 (“[T]he court does not approve settlements of representative proceedings, unless the represented persons are either under a mental disability or are minors.”).

167. Competition Act 1998, c. 4, §§ 49A–B (UK).

168. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4 (codified as amended at 28 U.S.C. §§ 1332(d), 1453, and 1711-15 (2005)).

169. 28 U.S.C. § 1712(e) (2012 & Supp. 2017).

170. *Id.* § 1712(a).

171. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN—EXECUTIVE SUMMARY 33 (1999), <https://bit.ly/35NIw0u>.

interests.<sup>172</sup> But the major limitation of the objector system is that often absent class members simply do not have the financial incentive to challenge a proposed settlement. Some commentators have suggested that what the U.S. class action system needs to protect absent class members from collusion is an appointed guardian ad litem for absent class members<sup>173</sup> or a “‘devil’s advocate’ to *oppose* class action settlements.”<sup>174</sup> In some instances, public interest groups have taken up the mantle of intervening in class actions and objecting to unfair settlement proposals.<sup>175</sup>

The CAFA also sought to address the problem of class member apathy with an additional requirement that a defendant give notice of any settlement proposal to the Attorney General of the United States and to appropriate state officials.<sup>176</sup> The U.S. Department of Justice (“DOJ”) or relevant state entities have the ability to intervene and object to the settlement.<sup>177</sup> Whether they have the political will to do so is another matter. Unfortunately, the DOJ made little use of this tool early on, filing only two objections soon after enactment of CAFA, and then did not file a single objection for ten years.<sup>178</sup> But in 2018, an associate attorney

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172. See Hurter, *supra* note 147, at 107 (“With the ‘adversarial void’ created by the unified front presented by the parties after settlement, when decadently one-sided arguments are presented in support of the settlement, the only other assistance may come from objections by class members, if any.”).

173. See Brunet, *supra* note 116, at 410 (“A second potential monitor of the behavior of class action attorneys is a court-appointed guardian ad litem for objectors and potential objectors to a proposed settlement.”); Issacharoff & Klonoff, *supra* note 77, at 1188 (“[C]ourts can appoint special masters, court experts, or other adjuncts to help with the settlement process and provide an additional layer of protection for the class.”); see also *In re Asbestos Litig.*, 90 F.3d 963, 972 (5th Cir. 1996) (noting that a law professor was appointed as guardian ad litem to review the fairness of settlement to the class), *vacated on other grounds sub nom.* Flanagan v. Ahearn, 521 U.S. 1114 (1997), *remanded to* 134 F.3d 668 (5th Cir. 1998).

174. Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 140, 155 n.274 (2014) (citing John Leubsdorf, Statement at the Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure (Nov. 22, 1996), in 4 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 9 (1997), available at <https://bit.ly/2MnDxf8> (proposing that Rule 23 be amended to “require courts to appoint a lawyer to challenge any proposed settlement in any class action in which the estimated value of the relief (including attorney fees) exceeds \$1,000,000”)).

175. See Brunet, *supra* note 116, at 409 (“At present, several public interest groups routinely seek intervention to participate in critiquing allegedly unfair proposed class actions settlements. Both Public Citizen and the Trial Lawyers for Public Justice Class Action Abuse Prevention Project have repeatedly represented objectors to proposed class action settlements.”); see also Klonoff, *supra* note 23, at 1630 (“[A]ggressive objections by public interest organizations have brought to light some serious ethical abuses.”).

176. 28 U.S.C. § 1715 (2012 & Supp. 2017).

177. See S. REP. NO. 109-14, at 32–33 (2005) (Conf. Rep.), available at <https://bit.ly/2ZmRW0w>; see also 28 U.S.C. § 517 (2018).

178. See Rachel L. Brand, Assoc. Attorney Gen., Dep’t of Justice, Remarks to the Washington, D.C. Lawyers Chapter of the Federalist Society (Feb. 15, 2018), available at <https://bit.ly/2m792jk>.

general announced that the DOJ had modified its screening procedure, which would result in objections being filed to unfair settlements.<sup>179</sup> And, in fact, the DOJ promptly filed three objections by mid-2018.<sup>180</sup>

In *Cannon v. Ashburn Corp.*, the DOJ objected to a proposed settlement because it paid too much to class counsel and included only “limited value” coupons for class members.<sup>181</sup> In *Cowen v. Lenny & Larry’s*, the DOJ objected because most of the settlement value was only in the form of free cookies (Lenny & Larry’s product at issue in the case), and class counsel would receive fees disproportionate to that value.<sup>182</sup> (One can only hope they were *darn* good cookies). And in *Chapman v. Tristar Products*, the DOJ objected because named plaintiffs and class counsel were to receive benefits disproportionate to the value of the settlement to absent class members.<sup>183</sup> These objections demonstrate the power of the CAFA notice provisions, when invoked, to correct and guard against collusive settlement practices.

In 2018, the federal judiciary’s Civil Rules Committee also amended Rule 23 to add stronger language to the section providing for judicial approval of settlements. As I’ve noted, this first line of defense—judicial supervision—may be the best guarantee of a fair settlement. Like CAFA’s restriction on coupon settlements, Rule 23 states that, where a settlement proposal would bind class members, a court may approve a settlement proposal only “after a hearing and only on finding that it is fair, reasonable, and adequate.”<sup>184</sup> In 2018, the Rules Committee added four specific questions that a court must consider before approving a proposed settlement: “whether: (A) the class representatives and class counsel have adequately represented the class; (B) [whether] the proposal was negotiated at arm’s length; (C) [whether] the relief provided for the class is adequate, . . . and (D) [whether] the proposal treats class members equitably relative to each other.”<sup>185</sup> These considerations go directly to addressing the collusive practices I’ve discussed by requiring courts to

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179. *See id.*

180. *See* Statement of Interest of the United States, *Cannon v. Ashburn Corp.*, No. 16-1452 (RMB/AMD), 2018 WL 1406882, at \*1 (D.N.J. Feb. 16, 2018), ECF No. 58 [hereinafter *Cannon Statement*]; Statement of Interest of the United States, *Cowen v. Lenny & Larry’s, Inc.*, No. 1:17-cv-01530, 2018 WL 7456041, at \*1 (N.D. Ill. Feb. 15, 2019), ECF No. 103 [hereinafter *Cowen Statement*]; Brief for the United States as Amicus Curiae in Support of Appellant and Urging Reversal, *Chapman v. Tristar Prods., Inc.*, Nos. 18-3847, 18-3866, 2019 WL 495842, at \*1 (6th Cir. Feb. 4, 2019), ECF No. 5 (appeal from Northern District of Ohio decision No. 1:16-cv-01114); *see also* *Department of Justice Increasingly Challenges Class Settlements*, JONES DAY (Mar. 2019), <https://bit.ly/2kgGiUZ>.

181. *See Cannon Statement, supra* note 180, at 1.

182. *See Cowen Statement, supra* note 180, at 1.

183. *See* Brief for the United States as Amicus Curiae in Support of Appellant and Urging Reversal, *supra* note 180, at 1.

184. FED. R. CIV. P. 23(e)(2).

185. *Id.*

ensure that any settlement actually benefits the class and that it is based on appropriate representation by class counsel. As the Rules Committee explained, “[t]he central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate,” and the inquiries added to the Rule will “focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.”<sup>186</sup>

One District Court has recently extended Rule 23’s description of a judge’s duty to the class in a dramatic fashion—and perhaps beyond what the Rule contemplates.<sup>187</sup> The Judge concluded that his fiduciary obligations permit him to enjoin settlement negotiations altogether until after a ruling has been made on whether to certify the class. He explained that “[t]o avoid . . . prejudice to absent class members, it is better to clear away any doubts about certification, so that if certification is granted, plaintiff’s counsel can negotiate from strength.”<sup>188</sup> According to the Judge, this procedure is necessary in part because, once there is a settlement agreement, counsel “will align to support the deal,” and “[n]either counsel will surface any problems that might have plagued a certification motion.”<sup>189</sup> As noted by the court, “[w]hen it comes to class action settlements, the usual criticism of trial judges is that they have done too little – not too much – in protecting class members.”<sup>190</sup> The defendant in that action is currently challenging the District Court’s order in the Ninth Circuit. Right or wrong, the District Court’s action was unquestionably motivated by exactly the concerns I’ve been discussing—the potential for a collusive settlement to the detriment of absent class members. And while it remains to be determined whether the District Court’s chosen course of enjoining settlement negotiations was permissible, in the abstract, close oversight and affirmative efforts to protect absent class members is what the rules encourage.<sup>191</sup>

So by way of legislative action, amendment to Rule 23, and strong judicial oversight, Congress and the federal courts have taken steps toward elimination of the collusion problem. Although such abusive practices may not yet be the problem in England and Wales that they have been in

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186. FED. R. CIV. P. 23 advisory committee’s note to 2018 amendment.

187. See Notice and Order Re Putative Class Actions, *Porath v. Logitech, Inc.*, No. 3:18-CV-03091 WHA, 2019 WL 266258 (N.D. Cal. Jan. 18, 2019), ECF No. 16.

188. Statement of District Court Judge William Alsup in Response to Mandamus Petition at 3, *In re Logitech, Inc.*, No. 19-70248, 2019 WL 4319012 (9th Cir. Feb. 28, 2019), ECF No. 4.

189. *Id.* at 4–5.

190. *Id.* at 10.

191. **Authors Note:** Six weeks after this lecture, the Ninth Circuit issued its ruling, suggesting that the Judge should have made “specific findings of the abuses” he “was concerned about,” or “consider[ed] narrower means of protecting the parties,” but finding no clear error justifying mandamus. See *In re Logitech, Inc.*, No. 19-70248, 2019 WL 4319012, at \*1 (9th Cir. Sept. 12, 2019).

the U.S. system, UK practitioners and law-makers are well-advised to take precautionary steps to strengthen judicial scrutiny of settlements and eliminate what could be a strong incentive for counsel to act against the interests of class members and other represented parties.

### C. *Cy Pres*

The third concept, which ties directly into our discussion of collusive settlements, is the practice of *cy pres* distributions. The doctrine of *cy pres* has increasingly been applied in U.S. class actions,<sup>192</sup> and has its origins in English law.<sup>193</sup> In fact, the first modern *cy pres* cases arose in seventeenth century English chancery courts in the context of charitable trusts.<sup>194</sup>

The common belief is that the term “*cy pres*” is derived from the Norman French expression *cy pres comme possible*, which means “as near as possible,”<sup>195</sup> and that is precisely what the doctrine attempts to do—require that a distribution of money or property be made in a way that is “as near as possible” to an intended distribution, where that original intended distribution cannot be realized. Although the term *cy pres* has been used to mean many things, I use the term here to describe the payment of class action damages to third party organizations, as an indirect means of benefitting class members, where distribution to the class members themselves is deemed impractical or impossible.

It is important to begin by noting that application of *cy pres* is not in itself improper or even problematic. *Cy pres* can be a useful tool where courts are unable to distribute a class award directly to class members. Where problems arise is when the *cy pres* doctrine is pushed to extremes, as it has been sometimes in recent U.S. jurisprudence.

As a starting point, there are many reasons why proceeds of a class action award may not viably be distributed directly to class members. The most common application of *cy pres* distribution awards occurs when a common fund has been created to pay damages to class members, and, after class members have made claims on the fund, money is left over.<sup>196</sup> This may happen where the parties have settled and overestimated the number of class members, or where class members don’t consider the size of their individual awards to be worth the effort of going through the claims process.<sup>197</sup> With residual funds remaining, the court administering the common fund must figure out what to do with them. Options include reversion of the unclaimed funds to the defendant, escheat to the state,

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192. See Wasserman, *supra* note 174, at 100.

193. See RACHAEL P. MULHERON, *THE MODERN CY-PRES DOCTRINE* 6 (2006).

194. See *id.*

195. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 168 (3d Cir. 2013).

196. See Wasserman, *supra* note 174, at 100.

197. See *id.* at 103–05.

distributing the funds on a pro rata basis to the class members who have already submitted claims, or distributing the fund cy pres to a third party organization.<sup>198</sup> Cy pres is an attractive option under these circumstances because it advances the class action goals of disgorgement and deterrence, and is designed to compensate class members, albeit indirectly.<sup>199</sup>

In some cases, cy pres has been used as the sole method of distributing damages.<sup>200</sup> Full cy pres is becoming a common practice where distribution of damages to class members is impractical because the per-class-member award is so small that it does not justify the administrative costs of delivering the award to each class member. In one recent case, the award per class member was three cents.<sup>201</sup> Of course, a U.S. postage stamp currently costs 55 cents. So the theory is that cy pres can be used to permit “aggregate calculation of damages” and the distribution of funds to “indirectly benefit the entire class,” where distribution directly to class members is too costly.<sup>202</sup>

The real problem with cy pres arises where the doctrine, “intended as a ‘salvage’ tool,”<sup>203</sup> is the motivating reason for initiating the class action, rather than a tool of last resort. And there are indications that the U.S. class action system is over-using—even abusing—cy pres. One study reports that, from the advent of the use of cy pres awards in class actions in 1974 through 2000, courts approved cy pres awards in only 30 cases.<sup>204</sup> Then from 2001 through 2010, cy pres awards were approved in sixty-five class actions.<sup>205</sup> Of these sixty-five cases, the majority occurred in class actions that were certified only for the purpose of settlement.<sup>206</sup> In ten of the sixty-five cases, the cy pres award was over 75% of the total settlement, and the authors of the study concluded that all ten of those cases were “potentially

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198. See Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 GEO. WASH. L. REV. 767, 768–69 (2014); see also Wasserman, *supra* note 174, at 106–14.

199. See *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) (“[C]y pres distributions have benefits over the alternative choices. Reversion to the defendant risks undermining the deterrent effect of class actions by rewarding defendants for the failure of class members to collect their share of the settlement. Escheat to the state preserves the deterrent effect of class actions, but it benefits the community at large rather than those harmed by the defendant’s conduct. *Cy pres* distributions also preserve the deterrent effect, but (at least theoretically) more closely tailor the distribution to the interests of class members, including those absent members who have not received individual distributions.”).

200. See, e.g., *Frank v. Gaos*, 139 S. Ct. 1041, 1047–48 (2019) (Thomas, J., dissenting).

201. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1037 (9th Cir. 2011).

202. *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990).

203. MULHERON, *supra* note 193, at 310.

204. See Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 653 (2010).

205. See *id.*

206. See *id.* at 661.



questionable cases” on the merits.<sup>207</sup> As discussed earlier, there can be no doubt that settlement-only classes, and particularly full cy pres settlement-only classes, can “be used by parties to conceal problematic types of class actions.”<sup>208</sup> That is to say, “where the class action procedure is used primarily for the benefit of participants in the process other than the absent claimants.”<sup>209</sup> It is, of course, easier to distribute funds to single, or a handful of, organizations than it is to administer the distribution of funds to thousands or even millions of class members. In either case, class counsel typically collect the same fee.<sup>210</sup>

Given the perverse incentives that sometimes exist for class counsel in these cases, it is particularly important that any class award be for the benefit of class members. As the Third Circuit has explained: “*Cy pres* distributions, while in our view permissible, are inferior to direct distributions to the class because they only imperfectly serve the purpose of the underlying causes of action – to compensate class members.”<sup>211</sup> Supreme Court Justice Thomas has taken this view a step further, suggesting that cy pres settlements are, in themselves, evidence of a conflict of interest between class counsel and class members: “[T]he fact that class counsel and the named plaintiffs were willing to settle the class claims without obtaining any relief for the class – while securing significant benefits for themselves – strongly suggests that the interests of the class were not adequately represented.”<sup>212</sup>

Regardless of whether cy pres awards should ultimately be permissible in some cases, it is clear that, too often, the interests of class members have been pushed to the side by cy pres awards that inure primarily to the benefit of class counsel and defendants.<sup>213</sup> Such awards create an indirect benefit to class members that is “at best attenuated and at worse illusory.”<sup>214</sup>

For example, in a class settlement related to the systematic overpricing of baby-related products, the defendant retailers paid \$35.5

207. *Id.*

208. *Id.* at 653.

209. *Id.* at 654.

210. See Hurter, *supra* note 147, at 102–03 (noting the argument that “*cy-pres* awards and injunctive relief serve[] primarily to inflate attorneys’ fee awards while providing little or no benefit to the class members”).

211. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169 (3d Cir. 2013).

212. *Frank v. Gaos*, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting).

213. See Jennifer Johnston, *Cy Pres Comme Possible to Anything Is Possible: How Cy Pres Creates Improper Incentives in Class Action Settlements*, 9 J.L. ECON. & POL’Y 277, 278–79 (2013) (“Courts that approve such vaguely related distributions do a great disservice to the absent class members, while at the same time furthering the interests of the plaintiffs’ attorneys, judges, the third party who receives the distribution, and – at times – even the defendants.”).

214. See *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 173.

million into a settlement fund.<sup>215</sup> Of that amount, \$14 million was slated to go to class counsel.<sup>216</sup> And because of difficulties in proving a claim (class members were required to submit a receipt), only \$3 million of the settlement fund—8.5% of the total fund—was expected to go to class members.<sup>217</sup> That’s only one-fifth as much as what was to be paid to class counsel. \$18.5 million was left for cy pres distribution.<sup>218</sup> The Third Circuit rejected this settlement and remanded with instructions for the District Court to consider “whether this or any alternative settlement provides sufficient direct benefit to the class” before approving the settlement.<sup>219</sup>

Even more egregious are recent full cy pres cases where class members received no benefit at all. In a settlement regarding privacy violations by Facebook, Facebook agreed to discontinue an invasive program and pay \$9.5 million.<sup>220</sup> But Facebook was free to restart the same program under a new name—and none of the \$9.5 million went directly to class members.<sup>221</sup> Instead, nearly one-quarter of the fund went directly to class counsel, and the \$6.5 million remaining was used to create a charitable foundation to educate the public about online privacy—with the condition that a Facebook representative would be one of three members of the foundation’s board.<sup>222</sup> The rationale behind this use of the fund was that the award per class member would be too small to justify distribution.<sup>223</sup> But the realities are plain: class counsel earned a handsome sum from the litigation, and Facebook earned the goodwill that goes with participation in a charitable organization, all the while obtaining the release of millions of class members’ claims. As U.S. Chief Justice Roberts has explained, there are “fundamental concerns surrounding the use of such remedies in class action litigation.”<sup>224</sup>

Another example of cy pres gone wrong occurred in *Frank v. Gaos*, a recent case involving a class action settlement with Google, again based on privacy violations. In that case, Google agreed to include disclosures related to the alleged privacy violation and to pay \$8.5 million into a settlement fund.<sup>225</sup> Under the agreement, however, Google could continue with the practice challenged in the lawsuit, and none of the money in the

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215. *Id.* at 169.

216. *Id.*

217. *Id.* at 169–70.

218. *Id.*

219. *Id.* at 170.

220. *Marek v. Lane*, 571 U.S. 1003, 1004–05 (2013) (Roberts, C.J., respecting the denial of certiorari).

221. *Id.*

222. *Id.* at 1005.

223. *Id.*

224. *Id.* at 1006.

225. *Frank v. Gaos*, 139 S. Ct. 1041, 1045 (2019).

settlement fund would be distributed to class members.<sup>226</sup> Instead, over \$5 million was to go to cy pres recipients, and more than \$2 million would go to class counsel.<sup>227</sup> Again, the parties and the District Judge approving the settlement justified this procedure on the basis that the per-class-member distribution of four cents would be too small to warrant the expense of mailing checks. As such, class members themselves were to receive no direct benefit from the settlement, leaving them to rely on a potential indirect benefit via cy pres distribution.

The cy pres recipients in *Frank v. Gaos* were selected by class counsel and Google, purportedly to “promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet.”<sup>228</sup> These are laudable goals, yet the organizations actually selected bore little relation to the subject of the class action. Specifically, the six organizations selected to receive the over \$5 million in settlement funds were the AARP, four universities, and the World Privacy Forum.<sup>229</sup> Only the last-named organization has a purpose specifically related to privacy interests. Inclusion of the AARP was especially troubling because it is a powerful interest group in the United States and conducts political activity in many fields wholly unrelated to privacy and technology. On review by the U.S. Supreme Court, Chief Justice Roberts echoed that concern, even asking during oral argument: “[D]o you think that problem is going to be meaningfully redressed by giving money to AARP? . . . [A]s if this is only a problem for elderly people?”<sup>230</sup>

I should also mention that where cy pres donations to charitable organizations are part of the settlement agreement, defendants often receive not only the goodwill accompanying those donations, but also tax breaks under the U.S. tax code.<sup>231</sup> Sometimes, the only people involved in the case who fail to benefit from a cy pres distribution are the absent class members themselves—the ones whose very claims are being settled.

While these abuses may not be familiar to the English judicial system, cy pres itself is. Indeed, in the 1801 English case *Brudenell v. Elwes*, Lord Chief Justice Kenyon gave a warning that both U.S. and English courts

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226. *Id.*

227. *Id.* at 1043.

228. *Id.* at 1045.

229. See *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 740 (9th Cir. 2017), *vacated and remanded sub nom. Frank*, 139 S. Ct. 1041 (2019).

230. Transcript of Oral Argument, *Frank*, 139 S. Ct. 1041 (2019) (No. 17-961), 2018 WL 5722840, at \*42.

231. See Wasserman, *supra* note 174, at 120 (“Typically, when a defendant makes a donation to charity in lieu of direct payments to class members, the defendant enjoys the good will and good publicity (and possibly even the tax deduction) associated with making a charitable gift . . .”).

would be well advised to heed: “The doctrine of cy pres goes to the utmost verge of the law . . . ; and we must take care that it does not run wild.”<sup>232</sup>

Recently, here in England, cy pres has been used in the consumer regulatory context. For example, in a highly publicized case in the early 1990s, Rover Car Company paid one million pounds for car research to the Consumers’ Association to compensate for breach of competition laws.<sup>233</sup> Under the new CAT collective action system, unclaimed funds from a judgment must be paid to the aptly named Access to Justice Foundation, and unclaimed funds from a settlement are subject to normal cy pres distribution or reversion, depending on the circumstances.<sup>234</sup>

The CAT procedure of distributing funds to the Access to Justice Foundation will avoid the difficulty the U.S. system has faced in deciding who should be a recipient of the funds. But it is also likely to present issues similar to those raised in the U.S. system as to what the purpose of the collective action is and whether distributing a significant portion of funds to the Foundation, instead of to class members, adequately accomplishes that purpose.

The cy pres distribution stemming from future settlements under the CAT procedure will likely present many of the concerns attendant to U.S. cy pres distributions. Bear in mind that class actions under the CAT system can be brought by ideological plaintiffs who have no claims of their own. That means that no injured individual is necessarily involved in the litigation at all. Given the potential for conflicts of interest to arise between an ideological plaintiff and the class, ensuring that cy pres distributions are appropriate and fair should be a priority for English courts. English judges may be able to avoid some of the pitfalls we’ve encountered in the U.S. through the consideration of alternatives to cy pres, along with careful oversight throughout the course of the litigation.

The U.S. class action system has yet to fully come to grips with the misuse of cy pres. Various alternatives have been proposed, though, and through the litigation process courts continue to weigh the appropriateness of cy pres awards. Critics of cy pres awards in class actions often propose three alternative approaches to address the problems inherent in such awards. First, there is the direct payment approach, under which an award is given to some class members on a pro rata or random basis rather than being distributed cy pres to charities. Another proposed approach is similar to the CAFA treatment of coupon settlements under which attorney fees for cy pres awards must be tied to the benefit actually received by the class. Finally, some critics, including Justice Thomas, suggest an approach under

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232. *Brudenell v. Elwes* (1801) 102 Eng. Rep. 171, 174; 1 East 442.

233. See Geraint Howells & Rhoda James, *Litigation in the Consumer Interest*, 9 ILSA J. INT’L & COMP. L. 1, 40 (2002) (citing David Nicholson-Lord, *Rover ‘Pays’ 1m Pounds Compensation*, INDEP. (Nov. 17, 1993, 1:02 AM), <http://bit.ly/2ksdl2U>).

234. See Mulheron, *supra* note 96, at 816–17.

which the need for a cy pres award is considered at the class certification stage. If the presiding judge found no direct benefit to class members, the class would simply not be certified. Other creative approaches to ensure that cy pres awards actually benefit the class, such as allowing class members to vote for a cy pres recipient, have been proposed, but they've not advanced beyond mere academic discussion.<sup>235</sup> I'll discuss the three primary cy pres alternatives in turn.

First, the direct payment approach comes in at least two forms. In one, where funds remain even after class members have been compensated, the American Law Institute ("ALI") has proposed that, rather than distributing to charities unclaimed or residual portions of a class award, the award be distributed to the already compensated class members on a pro rata basis. Specifically, the ALI approach suggests that, where funds remain after distribution to class members "the settlement should presumptively provide for further distributions to participating class members," and only where the amount is too small to make further distribution "economically viable" should cy pres distribution be considered.<sup>236</sup> Although this approach has not been formally adopted by Congress or the Civil Rules Committee, it is a logical extension of existing concepts regarding compensation to the class. For example, in one instance the Third Circuit remanded a judgment providing for a large cy pres award, suggesting that the District Court consider "provid[ing] greater direct benefit to the class" by increasing the pro rata award or "lowering the evidentiary bar for receiving a higher award" rather than distributing the significant residual funds cy pres.<sup>237</sup>

A very different direct payment approach is called for when a class award is insufficient to compensate all class members. Some academics have proposed a lottery or sampling approach under which the fund is used to compensate some class members at random, rather than distributing all funds cy pres and not compensating any class members directly.<sup>238</sup>

Both direct payment approaches have the advantage of actually being used to compensate *the injured class members* and eliminating the arbitrariness that can arise in cy pres awards.<sup>239</sup> Clearly, the primary

235. See, e.g., Chris J. Chasin, *Modernizing Class Action Cy Pres Through Democratic Inputs: A Return to Cy Pres Comme Possible*, 163 U. PA. L. REV. 1463, 1464–65 (2015).

236. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.07 (AM. LAW INST. 2010).

237. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013).

238. See, e.g., Shay Lavie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 GEO. WASH. L. REV. 1065, 1100 (2011).

239. See *id.* ("Where the cy pres doctrine fails to remunerate class members and creates unfettered judicial discretion, the reverse sampling method mandates courts to transfer the proceeds to the victims. Where the cy pres doctrine wastes judicial time and encourages charities to compete for windfalls, reverse sampling avoids beneficiaries' perverse incentives.").

purpose of a class award is to compensate members of the class, so direct payment approaches are superior to *cy pres* awards. In 2015, the Civil Rules Committee considered an amendment that would have adopted an approach similar to the one put forth by the ALI.<sup>240</sup> Yet for better or worse, the Committee ultimately concluded that such an amendment “would not be likely to improve the handling of [*cy pres*] issues” and that such issues could be adequately addressed through the existing settlement process.<sup>241</sup>

The second approach to remedy the *cy pres* problem is to treat fee awards for *cy pres* payments in the same way that coupon settlements are treated under CAFA: tying attorney fees to the benefit actually conferred on class members.<sup>242</sup> As Justice Thomas has explained, “*cy pres* payments are not a form of relief to the absent class members and should not be treated as such (including when calculating attorney’s fees).”<sup>243</sup> The ALI has recommended a similar, but slightly more lenient approach, suggesting that attorney fees can be based on the value of *cy pres* awards, but that because such awards “only indirectly benefit the class, the court need not give such payments the same full value for purposes of setting attorneys’ fees as would be given to direct recoveries by the class.”<sup>244</sup> In 2017, a bill to do just that was introduced in the House of Representatives.<sup>245</sup> The bill prescribed that, where a class action resulted in a monetary award, attorney fees would be “limited to a reasonable percentage of any payments directly distributed to and received by class members” and “[i]n no event” were attorney fees to “exceed the total amount of money directly distributed to

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240. See ADVISORY COMM. ON CIVIL RULES, CIVIL AGENDA BOOK 201 (2015), available at <https://bit.ly/2mb9mxK> (“If the proposal involves individual distributions to class members and funds remain after initial distributions, the proposal must provide for further distributions to participating class members . . . unless individual distributions would not be economically viable or other specific reasons exist that would make such further distributions impossible or unfair.”).

241. *Id.* at 90.

242. See, e.g., Tidmarsh, *supra* note 198, at 788–89 (“[I]n calculating the amount of the recovery on which the [fee] percentage is calculated, a court must include only the amount distributed to class members. . . . [This modification] eliminate[s] the incentive for class counsel to press for *cy pres* relief; the reason is that these distributions, as well as the time counsel spent obtaining or administering them, would not be compensable elements of class counsel’s fee.”); Wasserman, *supra* note 174, at 137 (“I propose that courts alter the method they use to calculate attorneys’ fees. In particular, borrowing from the solution Congress adopted in the Class Action Fairness Act to address the problem of coupon settlements, I propose that courts presumptively reduce attorneys’ fees whenever all or a portion of the class action settlement is distributed to charities *cy pres*.” (internal footnotes omitted)).

243. *Frank v. Gaos*, 139 S. Ct. 1041, 1047–48 (2019) (Thomas, J., dissenting).

244. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.13 cmt. a (AM. LAW INST. 2010).

245. See Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017).

and received by all class members.”<sup>246</sup> The bill passed in the House, but died in the Senate Judiciary Committee.<sup>247</sup>

Still, although this reduced-fee approach has not been codified, some courts have applied it in certain instances.<sup>248</sup> The Third Circuit has explained that “[c]lass members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either.”<sup>249</sup> So “[w]here a district court has reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class, . . . it [is] appropriate for the court to decrease the fee award.”<sup>250</sup> As in the coupon settlement context, such a change would help to “better align the interests of class counsel and the class.”<sup>251</sup>

Finally, the third approach to address inappropriate *cy pres* awards would be to deny class treatment where it is impossible to actually compensate class members. If the purpose of a class action is to obtain relief on a class-wide basis, then arguably class treatment is not appropriate where there is no direct relief for the class. Indeed, in such cases relief in the form of a declaratory judgment or regulatory action may be “superior” both in terms of obtaining relief for the class and judicial economy. Because under Rule 23(b)(3) a class may be certified only where the class action device is “superior to other available methods for fairly and efficiently adjudicating the controversy,”<sup>252</sup> a class should not be certified where other procedural devices would be at least as effective. As Justice Thomas has explained, a class action may not be superior to other procedural devices “when it serves only as a vehicle through which to extinguish the absent class members’ claims without providing them any relief.”<sup>253</sup>

Here is a gross example, in a case from the District of New Jersey, where the parties prepared a proposed settlement resulting in a full *cy pres* award, in part because the class members did not want to participate in the class action.<sup>254</sup> The Court concluded that the settlement was “a thinly disguised ploy for the recovery of nearly \$500,000 in attorneys’ fees” and

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246. See H.R. 985 § 103 (as passed by House, Mar. 9, 2017).

247. See H.R. 985 - *Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017*, CONGRESS.GOV, <https://bit.ly/2lZp3rx> (last visited Sept. 22, 2019).

248. See, e.g., *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 170 (3d Cir. 2013) (“[W]e confirm that courts need to consider the level of direct benefit provided to the class in calculating attorneys’ fees.”).

249. *Id.*

250. *Id.*

251. Wasserman, *supra* note 174, at 137.

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

253. *Frank v. Gaos*, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting).

254. See *In re Matzo Food Prods. Litig.*, 156 F.R.D. 600, 606 (D.N.J. 1994).

that, because the class members did not want to pursue their claims, “the [settlement] fund never should have been created in the first place.”<sup>255</sup>

Any of these approaches, or a combination of them, could help to resolve the *cy pres* problem in U.S. class action litigation, and a definitive ruling on *cy pres* awards seems imminent. Indeed, the *Frank v. Gaos* case I mentioned was before the U.S. Supreme Court this past term. Some anticipated that the Court would address the viability of full *cy pres* awards. The question before the Court was “[w]hether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be ‘fair, reasonable, and adequate.’”<sup>256</sup> Unfortunately, the Court did not answer that question, instead remanding the case on standing grounds. We’ll continue to wait for the next major development in U.S. class action *cy pres* awards. Regardless, England and Wales may benefit from considering these questions preemptively, before the possibility of large *cy pres* awards under the CAT system is realized.

#### D. *Harassing Claims/Strike Suits*

I’ve been discussing ways in which the class device is abused and how the interests of class members are sometimes subordinated to the interests of others. But there is another abusive practice in the U.S. class action system, and it harms certain targeted defendants: the filing of so-called “strike suits.” This occurs when plaintiffs file meritless putative class actions simply for their settlement value, because they know defendants will find it is more expensive to defend the meritless action than to pay a settlement.<sup>257</sup>

Class actions are themselves big business in the U.S. They’re not a “cottage industry.” In a recent survey of 400 U.S. companies, the companies reported spending a combined \$2.46 billion in 2018 just defending class actions.<sup>258</sup> The expected cost for the same companies to defend against class actions in 2019 is even higher: \$2.56 billion.<sup>259</sup> When so much money is being shelled out just for *defense* costs alone—not judgment or settlement costs—it leaves significant room for settlement negotiations.

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255. *Id.*

256. Petition for Writ of Certiorari, *Frank*, 139 S. Ct. 1041 (Jan. 3, 2018) (No. 17-961), 2018 WL 347810, at \*1.

257. See Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 523 (1997).

258. CARLTON FIELDS, 2019 CLASS ACTION SURVEY 6–7 (2019), <https://classactionsurvey.com>.

259. See *id.*



Just as there are professional objectors, there are professional class action filers—both attorneys and named plaintiffs who repeatedly file class actions, often without adequate legal basis, and almost always for the sole purpose of extracting a settlement. In the United States, there are no major obstacles to *filing* a claim, including a putative class action. A plaintiff need only file a complaint and pay a filing fee. And if a plaintiff does not intend to actually litigate the claim, plaintiff and counsel don't have to spend a lot of money conducting discovery and preparing a case. The complaint needs only to meet the minimal standard of plainly stating a legal claim. But, for a defendant, defending against even a meritless claim may mean significant expense—and perhaps even negative publicity.<sup>260</sup>

And, unlike in the UK, the American Rule for fees does not presumptively allow fee-shifting if a plaintiff's claim fails. Instead, defendants must bear their own costs even when defending against a weak claim, unless a defendant can establish that the plaintiff acted in bad faith—a high bar that is rarely met where a claim had any arguable merit at the time of filing. Defendants therefore have a strong interest in avoiding or minimizing defense costs—even if they are confident of ultimately prevailing—because they will be on the hook for those costs no matter what.<sup>261</sup> As one academic has explained it, “[w]hen you win, you lose under our system, I win, I defeat your claim . . . but it has cost me tens, hundreds of thousands, sometimes millions of dollars. I have a victory that has brought me to the poorhouse.”<sup>262</sup> Well, it may not always be that bad—but it is true that some attorneys and plaintiffs can make a decent living simply by filing arguably meritless putative class claims “with little hope of success on the merits and merely to extract a settlement from defendants.”<sup>263</sup> As explained by Congress when it was addressing strike suits in the securities context, “[w]hether a shareholder lawsuit is meritorious or not, the corporation sued must spend a great deal of money to defend itself. It is common for a corporation simply to agree to a substantial settlement out of court.”<sup>264</sup>

Further, given the sometimes astronomical awards in successful class action cases, risk-averse defendants may be inclined to settle even when there is only a “tiny probability of an enormous judgment,” rather than

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260. See Hurter, *supra* note 147, at 100.

261. See Lopatka & Smith, *supra* note 121, at 873.

262. See MARIE GRYPHON, GREATER JUSTICE, LOWER COST: HOW A “LOSER PAYS” RULE WOULD IMPROVE THE AMERICAN LEGAL SYSTEM 3 (2008) (quoting Professor Jon Langbein, *The Trouble with Lawyers* (ABC television broadcast Jan. 2, 1996)), available at [https://media4.manhattan-institute.org/pdf/cjr\\_11.pdf](https://media4.manhattan-institute.org/pdf/cjr_11.pdf).

263. Lopatka & Smith, *supra* note 121, at 873.

264. See H.R. REP. NO. 104-50, pt. 1, at 15 (1995) (Conf. Rep.), available at <http://bit.ly/2muDGna>; see also GRYPHON, *supra* note 262, at 6 (“[S]ettlement of nuisance suits is the norm under the American rule.”).

engaging in bet-the-company litigation.<sup>265</sup> Unlike a typical *A v. B* lawsuit, where a defendant is inclined to take a chance on going to trial because it perceives its likelihood of success as substantial, a defendant in a class action faces a unique risk of being held liable to a class of at least dozens—and perhaps tens of thousands—of members.<sup>266</sup> Thus, even where a defendant believes it is likely to win on the merits, it may conclude that the risk is simply too great. As one court has explained, defendants effectively face two alternatives: “to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.”<sup>267</sup>

These circumstances have resulted in a cadre of class action filers who repeatedly file meritless claims. In the same 2018 survey of 400 U.S. companies cited earlier, the companies reported that 39% of class claims are settled between the defendant and the named plaintiff in his individual capacity.<sup>268</sup> Stated differently, the putative class claims are settled as standard *A v. B* claims, paying no heed to the interests of absent class members. In these types of individual settlements, absent class members are not bound, but of course they have received no benefit. While there may be legitimate cases in which it makes sense for a putative class representative to settle his individual claim, this individual settlement figure might be considered a loose proxy for the number of non-meritorious putative class claims filed. Presumably, a class representative would not settle on an individual basis if there was a decent likelihood of a class-wide settlement or judgment.

Similarly, a study of securities class actions indicates that from 1997 to 2017, 50% of claims were settled, 43% were dismissed, and less than 1% went to trial.<sup>269</sup> This may suggest, by inference admittedly short of empirical certainty, that the majority of putative securities class actions are not meritorious. In the early 1990s, one plaintiffs’ firm filed 229 putative securities class actions over 44 months. The lead attorney was quoted as saying “I have the greatest practice of law in the world. I have no

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265. Lopatka & Smith, *supra* note 121, at 873.

266. See Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1391–92 (2000) (“By threatening the defendant with a classwide trial on the common issues, so goes the argument, plaintiffs may be able to extract a substantial settlement even for weak claims. . . . Thus, this argument concludes, class action treatment exposes the defendant to a form of extortion not present in the separate-action context.” (footnote omitted)).

267. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

268. See CARLTON FIELDS, *supra* note 258, at 35.

269. STANFORD LAW SCH., SECURITIES CLASS ACTION FILINGS – 2018 YEAR IN REVIEW 16 (2019), <https://stanford.io/2mf2yit> [hereinafter *Clearinghouse 2018 Year in Review*].

clients.”<sup>270</sup> That’s only an anecdote, but it does highlight an abuse that is not reflective of the goal of class actions. As an aside, that attorney and his partner later went to prison for bribing individuals to serve as clients.<sup>271</sup> Regardless, then, of the exact proportion of U.S. putative class actions that are filed simply for their settlement value, there can be no dispute that the practice exists, and that it reflects badly on the U.S. class action system.

When it comes to strike suits, the English collective action model may have the upper-hand. The ratification procedure for GLOs and the demanding approval process for CAT collective actions have, as I’ve said, resulted in there being only 105 GLOs over the past 18 years, and no CAT collective actions at all. These early approval processes, and their strict application, likely deter the filing of weak class claims solely to extract some kind of settlement. The express consideration of the preliminary merits of the case as part of the CAT collective action approval process may well be an effective bar on meritless claims. Perhaps even more importantly, the English Rule for fee-shifting protects English defendants against the enormous costs that are often born by U.S. litigants. Where an English defendant successfully defends against an action, whether a collective action or otherwise, the plaintiff, if he loses, presumptively bears the defense costs.<sup>272</sup> As a result, defendants are not under pressure to settle simply to avoid attorney fees and costs.

Still, the United States has taken some steps to prevent strike suits, and those measures might be relevant to the evolving English experience with aggregate litigation. For example, in the field of securities litigation, Congress recognized the problem of unfounded securities fraud class actions, and in 1995 passed the Private Securities Litigation Reform Act (“PSLRA”).<sup>273</sup> Indeed, the purpose of Title I of the Act is clearly identified in its heading, “Reduction of Abusive Litigation.”<sup>274</sup> Among other things, the Act required averments of good faith filings by the representative parties and barred “professional plaintiffs” by stating that “a person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, in no more than 5 securities class actions brought as plaintiff class actions . . . during any 3-year period.”<sup>275</sup> The Act also expressly limits payment to a

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270. H.R. REP. NO. 104-50, at 16 (1995) (Conf. Rep.) (quoting William P. Barrett, *I Have No Clients*, FORBES, Oct. 11, 1993, at 52 (referring to class-action lawyer William Lerach)), available at <http://bit.ly/2muDGna>.

271. See Neil Weinberg, *Shakedown Street*, FORBES (Feb. 11, 2008, 5:54 PM), <http://bit.ly/2IHINQt>; see also Lisa L. Casey, *Class Action Criminality*, 34 J. CORP. L. 153, 157 (2008).

272. See CPR 44.2(2)(a) (Eng.).

273. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

274. See *id.*

275. *Id.* § 27(a)(3)(B)(vi) (codified as amended at 15 U.S.C. § 78u-4(a)(3)(B)(vi) (2012)).

representative party, through final judgment or settlement, to the amount that would be awarded to any other class members,<sup>276</sup> removing some of the financial incentive for someone trying to serve as a repeat plaintiff. The Act further provided for mandatory sanctions and a presumption in favor of fee-shifting where a party or attorney files a meritless or unfounded complaint in violation of Federal Rule of Civil Procedure 11.<sup>277</sup> The purpose of Rule 11 is to deter meritless pleadings and motions by clarifying that filing alone constitutes a certification that there is a basis in law and fact for the pleading or motion, and that it is not being presented for an improper purpose.<sup>278</sup> While Rule 11 has its own discretionary sanctions provision,<sup>279</sup> the PSLRA mandatory provision amplified the force of the Rule.

The Securities Class Action Clearinghouse began monitoring the filing of federal securities class actions in 1996, following passage of the PSLRA.<sup>280</sup> The Clearinghouse recorded a dip in filing immediately after the passage of the Act, with only 110 federal securities class actions filed in 1996.<sup>281</sup> Since then, however, that number has generally tracked upwards. In 2017, 412 actions were filed, while 402 were filed the following year.<sup>282</sup> The 402 figure for 2018 is approximately 99% higher than the average number of filings for each year between 1997 and 2017.<sup>283</sup> Approximately 200 securities actions have already been filed so far in 2019, putting filings on track with the high totals reached in recent years.<sup>284</sup> Here's an interesting data point: apparently, only three law firms are responsible for over half of all securities class action filings in recent years, and these same law firms have consistently had higher than average dismissal rates.<sup>285</sup> So while the PSLRA took significant steps toward reducing the incidence of abusive securities fraud litigation, there is reason to be concerned that such litigation is again on the rise.<sup>286</sup>

In order to more effectively resolve the problem of strike suits being filed in the U.S., in the securities field and in others, we may be well-

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276. *See id.* § 21D(a)(2)(A)(vi) (codified as amended at 15 U.S.C. § 78u-4(a)(2)(A)(vi) (2012)).

277. *See id.* § 21D(c)(2)–(3) (codified as amended at 15 U.S.C. § 78u-4(c)(2)–(3) (2012)).

278. *See* FED. R. CIV. P. 11(b).

279. *See* FED. R. CIV. P. 11(c).

280. *See* Stanford Law Sch., *About Us*, SEC. CLASS ACTION CLEARINGHOUSE, <https://stanford.io/2kEymwT> (last visited Sept. 22, 2019).

281. *Clearinghouse Filings 1996–YTD*, *supra* note 7.

282. *See id.*

283. *See id.*; *see also* *Clearinghouse 2018 Year in Review*, *supra* note 269, at 5.

284. *See* *Clearinghouse Filings 1996–YTD*, *supra* note 7.

285. *See* *Clearinghouse 2018 Year in Review*, *supra* note 269, at 36–37.

286. *See also* Klonoff, *supra* note 23, at 1589 (“There is a simple reason why securities fraud class actions have not been severely impacted by the overall decline in class actions: They are highly suitable for class certification.”).

advised to take a leaf from the English litigation handbook. The summary judgment process in the U.S. is an effective method of weeding out clearly meritless putative class actions. The process is less effective, though, in protecting defendants where it takes place only years after the filing of a putative class action and only after significant and costly discovery has taken place.<sup>287</sup> Expedited proceedings for unfounded class claims may help to resolve this process. U.S. jurists and legislators may also consider revising the class certification procedure to include an express consideration of the merits of a claim. Expediting class certification could also then protect defendants from meritless strike suits.

Although it would be a radical change, U.S. courts might consider moving toward shifting defense costs to professional class action filers who repeatedly file weak or unfounded putative class actions.<sup>288</sup> This procedure proved somewhat successful, at least for a limited time, in the securities context under the PSLRA. In general, we in the U.S. are hesitant about shifting costs from companies to individual plaintiffs who may be attempting in good faith to secure relief. Yet courts cannot sit idly by while defendants, usually corporate defendants (which, I realize, do not ordinarily engender much sympathy), are forced to absorb significant defense costs to defend against unfounded claims. Almost always, those costs are passed on to consumers—as businesses make market adjustments, and as counsel enjoy windfalls without consequence.<sup>289</sup>

#### E. *Class Action Waivers*

Finally, an issue that has in recent years been a hot topic in the field of U.S. class actions is the class action waiver. These waivers are often coupled with arbitration agreements, especially in employment contracts,<sup>290</sup> and they effectively prevent employees subject to the agreements both from litigating their claims in court and from pursuing any form of class-based relief.<sup>291</sup> What is even more concerning is the use

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287. See *GRYPHON*, *supra* note 262, at 11 (“Plaintiffs’ attorneys in the United States bury defendants in onerous discovery requests, knowing that their clients bear none of the costs of document production; the cost of discovery itself increases cases’ settlement value.”).

288. See *id.* at 7 (“[T]here is a broad consensus that a loser-pays rule would reduce the number of nuisance suits.”).

289. See *id.* at 3.

290. See Klonoff, *supra* note 23, at 1595.

291. See Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 609 (2018) (“These clauses (inserted in job applications and consumer product information) typically mandate that if disputes arise, claimants may not pursue their rights in courts but can only proceed, single-file, in dispute resolution systems designated by employers or manufacturers.”).

of class action waivers in standard-form consumer contracts.<sup>292</sup> By their nature, class action waivers prevent individuals from realizing the efficiency and cost-saving advantages of collective action. Two academics have suggested that companies that use these waivers are essentially “engaging in ‘do-it-yourself tort reform,’ freeing themselves from liability without having to convince legislatures to change the substantive law.”<sup>293</sup>

Individuals may well be dissuaded from bringing an action at all if the costs of litigating a claim are beyond the means of one person alone. In the 2011 case of *AT&T v. Concepcion*, the Supreme Court held that arbitration and consumer class action waiver provisions used by AT&T in a consumer context were enforceable.<sup>294</sup> In that case, the plaintiffs raised claims of fraud and false advertising against AT&T, but an individual customer’s damages amounted to only \$30.22.<sup>295</sup> Such a low amount would generally make litigation cost-prohibitive on an individual basis. Judge Posner may have said it best when he observed that, “only a lunatic or a fanatic sues for \$30.”<sup>296</sup> Applying a class action waiver to these types of claims will likely result in the vast majority of them not being pursued. As explained by one leading class action expert, in these types of claims, “the class members have *no* practical remedy without a class action” and “[w]ithout the class action device, a company or individual could cause small harm to many people, knowing that the costs of bringing individual suits would be too great to warrant hiring an attorney and filing a lawsuit.”<sup>297</sup> Class action waivers have the potential to significantly reduce the benefits of the liberal U.S. class action system, and they are becoming increasingly prevalent.

After the Supreme Court’s decision in *AT&T v. Concepcion*, only 316 claims were filed in arbitration against AT&T between 2014 and 2017.<sup>298</sup> Compare that to AT&T’s customer base of 147 million during the same period.<sup>299</sup> The author of the report compiling this data concluded: “In short, almost no one turns to the self-proclaimed ‘effective’ method of redress that companies have imposed.”<sup>300</sup>

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292. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340 (2011); see also Klonoff, *supra* note 23, at 1596 (“By 2026, arbitration clauses barring class actions (either in litigation or in arbitration) are likely to be common in both the consumer and employment areas.”).

293. Jean R. Sternlight & Elizabeth T. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 *LAW & CONTEMP. PROBS.* 75, 103 (2004).

294. See *Concepcion*, 563 U.S. at 346–47.

295. See *id.*

296. *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

297. Klonoff, *supra* note 148, at 815–16.

298. See Resnik, *supra* note 291, at 650.

299. See *id.*

300. *Id.* at 652; see also Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need*

Not surprisingly, corporations favor the class action waiver. As one academic has put it, “[a] corporate defendant can limit its liability, or escape it altogether, through negating the power of the class and its combined resources.”<sup>301</sup> Indeed, in the 2018 survey of 400 companies previously cited, nearly 50% of the companies surveyed responded that they included class action waivers in their arbitration agreements.<sup>302</sup> And in 2018, the U.S. Supreme Court again affirmed the legality of such a practice, holding that arbitration agreements including a collective action waiver must be enforced as written.<sup>303</sup>

So far, it appears that class action waivers have not secured a foothold here in England and Wales—at least not nearly to the extent that they have in the U.S.<sup>304</sup> But courts may very well enforce an arbitration agreement to prevent an individual from joining a GLO or even to prevent a class member from obtaining damages based on CAT collective proceedings.<sup>305</sup>

Unlike the other class action problems I’ve identified, the U.S. system has yet to adopt any measure addressing the class action waiver issue. While these waivers impair use of the class action device, it is not even clear that they should be considered an “issue” requiring correction. Not all class action waivers are alike, and they inevitably present questions of freedom of contract, unconscionability, and public policy. Yet they clearly place at odds the right to contract, along with the enforceability of

*Congress to Act*, 9 HARV. L. & POL’Y REV. 329, 337 (2015) (“Very few individuals file arbitration cases.”).

301. Nicole Allyson Chamberlain, *Contracting-Out of Class Action Litigation: Lessons from the United States*, 3 N.Z. L. REV. 371, 378 (2018).

302. CARLTON FIELDS, *supra* note 258, at 38.

303. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018); *see also* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238–39 (2013) (holding that a class action waiver in an arbitration clause is enforceable even if the result is that low-value claims cannot be brought economically); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding that state rule prohibiting class action waivers in arbitration agreements as unconscionable is preempted by federal law).

304. *See* Gregg Rowan et al., *Class and Collective Actions in the UK*, LEXOLOGY (Oct. 26, 2018), <https://bit.ly/2kMwVMP> (“Class-action waivers are not commonly used in England and Wales, as they are (for example) in the United States.”).

305. *See id.* (“[I]n principle, it seems likely that an English court would uphold an arbitration agreement to prevent a claimant joining an action which is proceeding under a group litigation order (which is an opt-in rather than opt-out mechanism) where that claimant’s claim is the subject of a valid arbitration agreement. It remains untested whether a class-action waiver in an arbitration clause would be effective to prevent a class member claiming an entitlement to damages following a judgment or settlement in opt-out collective proceedings before the Competition Appeal Tribunal, where the claims pursued in the collective proceedings fell within the arbitration clause.”); *see also* Jamie Maples et al., *United Kingdom Class Actions*, GETTING DEAL THROUGH, <https://bit.ly/2INw3rz> (last visited Sept. 22, 2019) (“If a party participates in a collective action in breach of an arbitration clause, the court will almost certainly enforce the arbitration clause. Arbitral tribunals have limited powers to consolidate proceedings in the absence of the consent of the parties. Accordingly, to the extent collective actions are permitted within arbitration at all, it is on an opt-in basis.”).

arbitration clauses, and the liberal class action system in the U.S. Some have even gone so far as to opine that the Supreme Court's class action waiver decisions "will be the end of class actions in the United States."<sup>306</sup> So far, the U.S. Supreme Court seems to lean in favor of arbitration provisions,<sup>307</sup> but both courts and practitioners should be aware of these conflicting interests.

Given the Supreme Court's decisions on class action waivers, Congress is perhaps in the best position to make any changes regarding the practice.<sup>308</sup> Yet so far, Congress's most significant action on the topic has been in favor of waivers. In 2017, the Consumer Financial Protection Bureau issued a final rule that would have prohibited some providers of consumer financial products from using arbitration agreements to bar class actions.<sup>309</sup> Before the rule could go into effect, Congress disapproved it via a joint resolution under the Congressional Review Act, and the President signed that joint resolution into law.<sup>310</sup>

Recently, employees in some industries have begun to organize against the practice of class action waivers, asserting their right to collective action and challenging boilerplate contract terms that impair that right.<sup>311</sup> In 2014, backlash from a broad consumer arbitration provision on General Mills' website—including letters to Congress stating "Trix don't belong in the fine print"—resulted in the company removing the arbitration clause.<sup>312</sup> So action outside of the judicial process may be an effective way, at least for now, of challenging class action waivers.<sup>313</sup> Of this I am certain: challenges to the class action waiver are by no means a thing of the past.

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306. Chamberlain, *supra* note 301, at 378.

307. *See, e.g., Epic Sys. Corp.*, 138 S. Ct. at 1632; *AT&T Mobility*, 563 U.S. at 352.

308. Others agree. *See, e.g., Klonoff, supra* note 148, at 830 ("[T]he only viable approach to address [the Supreme Court's class action waiver rulings] is through legislation. A rule change will not work."); Sternlight & Jensen, *supra* note 293, at 103 ("[A]s a matter of fairness, efficiency, and justice, Congress should prevent companies from exempting themselves from class action liability.").

309. *See* Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).

310. Congressional Review Act, Pub. L. No. 115-74, 131 Stat. 1243 (2017).

311. *See* Gerrit De Vynck & Josh Eidelson, *Google Will Stop Making Employees Waive Class Action Rights*, BLOOMBERG (Feb. 21, 2019, 10:05 PM), <https://bloom.bg/2klXPeu>; *see also* Dave Simpson, *Google to End Forced Work Arbitration, Class Action Waiver*, LAW360 (Feb. 21, 2019, 9:15 PM), <https://bit.ly/2knkDdS>.

312. Barnes, *supra* note 300, at 348–49.

313. *See id.* at 352 ("Increasing public education of and agitation by consumers around the harms of mandatory arbitration agreements and class action bans is key.").



## V. CONCLUDING REMARKS

Let me conclude by admitting that nerdy class action junkies like me are comparatively few. I teach the subject. I've written on the subject. And I continue to be intrigued by the dynamics and the efficiencies of the class action device. It is indeed, as Dick Posner has described it, "an ingenious procedural innovation." No country outside of the U.S. has sought to exactly replicate it. And that may work to the advantage of those legal systems that are only now developing procedures that permit the aggregation of claims.

The collective action system here in England and Wales is still in its early stages. I've talked about its several forms. As jurists and litigants experiment with these new procedural devices, particularly the CAT collective action, it makes sense to look to the United States and learn from our experiences—both good and bad; both the efficiencies and the excesses. We in the U.S. may similarly be well advised to look to both new and old aspects of the English system and consider adopting those elements that would translate across the Atlantic in a way that could improve our class action model. As with all of life, we learn from one another.