payments to Israeli class representatives are much more significant than those given to U.S. class representatives. Although the United States has four types of class actions, while Israel has only a 23(b)(3)-type class, this difference is immaterial as far as monetary class actions are concerned, since in the United States, as in Israel, virtually all class actions for money are brought under one provision, namely Rule23(b)(3).[253] It is true that in Israel, almost no class actions are brought for nonmonetary remedy alone, but in the United States as well most class actions seek damages in whole or in part.

Fourth, while both countries have cy pres remedies, the law in Israel is much more flexible — it is not limited to unclaimed funds, and there is no requirement that the designee have any relationship to the issues in the case. This affects not only the distribution of funds but also certification, as requirements that pertain to the identification of class members are insubstantial in Israel. Thus, potential legal problems in the United States, such as ascertainability and "no injury" class actions, are much less important in Israel, because the entire recovery can be awarded through a cy pres mechanism.

Finally, while the U.S. system frequently requires individual notice to class members, which can be very expensive, Israeli notice requirements are much laxer, as only public notice is required. This significantly reduces the costs of notice, as well as the potential that class members will opt out of the class action.

True, Israeli law poses some litigation risks which are absent in the United States. Most significantly, the CAL requires representative plaintiffs to show a reasonable likelihood that common issues would be decided in favor of the class, and it shifts the defendant's costs to the representative plaintiff if the class certification motion is denied. However, as we maintain below, these risks have mainly affected not the number of class action filings, but their qualitative features. In their shadow, class actions have gravitated toward simpler to file causes of action, based on straightforward factual and legal allegations, which constitute little risk of dismissal.

B. Explaining the Wider Variety of U.S. Cases and the Much Larger Verdicts

As noted, the Israeli recoveries tend to be modest, and the cases are limited almost exclusively to simple consumer cases. What explains the difference

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that "[m]ost civil-law countries believe that it is the role of the government, not private litigants, to regulate conduct" in respect to class actions).

253 *See supra* text accompanying note 51.

from the United States, which has a much wider variety of class actions and much larger verdicts?

Of course, one easy explanation for smaller verdicts is that Israel is a much smaller country. Thus, a nationwide class action in Israel will generally involve a much smaller number of class members than a nationwide class in the United States, and consequently the total value of judgments and settlements will be significantly lower. This, however, cannot fully explain the different distribution of cases between the two countries, and the high frequency of simple consumer cases in Israel. We therefore believe that there are additional factors at play other than this obvious one, based on population.

Most importantly, class actions in such areas as securities fraud, antitrust, and employment discrimination are extremely fact-specific, and are also expert-intensive. Indeed, this is true even in many consumer cases in the United States, where the issues involve complex claims of product defect. Class counsel often invests millions of dollars in pre-certification discovery and expert witnesses. In the United States, wide-ranging pretrial discovery enables class counsel to explore a defendant's documents, take depositions of key witnesses, and obtain discovery from a defendant's experts. Moreover, because the cases tend to be handled by large, highly solvent firms, the class can match the resources of large defense law firms. In Israel, by contrast, class actions are handled mainly by solo practitioners and small firms, i.e., lawyers without the resources to prosecute expensive, fact-laden cases, such as securities fraud or antitrust. Their limited capacity, in terms of hours spent on each case, and their lack of deep pockets (which are necessary for financing complicated evidence production and discovery, as well as expert opinions), render filing and litigating complicated cases by Israeli class action lawyers almost impossible.

Relatedly, without a significant pretrial discovery procedure, class counsel in Israel generally would not be able to establish the likelihood of winning on the merits. Israeli law requires courts to examine the merits of the case and find whether there is a reasonable likelihood that issues common to the class would be decided in its favor. This requirement poses a significant hurdle for certification, but only for complicated cases that involve uncertain factual and legal claims. Thus, Israeli class actions gravitate toward simple cases, whose factual allegations are simple to plead and prove. This specific requirement is absent in the United States (although the class certification requirements sometimes overlap with the merits).

Finally, Israeli fee shifting rules expose the representative plaintiff to the risk of paying the defendant's costs if certification is denied. Even though these costs are usually modest, they still pose a risk for the representative plaintiff, which is not borne by his counterpart in the United States. Paying

Israeli class representatives high awards when winning or settling the case, exceeding the nominal incentive payments awarded in the United States, is probably insufficient to induce filing of complicated, and therefore risky, claims.

In sum, the U.S. system is designed as a private attorney general system to enforce complex laws such as securities, antitrust, and employment. The Israel system, in comparison, is currently focused on deterrence in a narrow category of consumer cases, enforcing simple regulatory mandates. This focus is unlikely to change unless larger law firms enter the class action bar, and unless courts allow more elaborate factual discovery prior to certification.

Conclusion

By focusing on the similarities and differences between the U.S. and Israeli class action regimes, we have explained why Israel has seen such a large number of class action filings (much larger per capita than the United States). At the same time, we have explained why the United States has a much wider variety of class actions and why the judgments, in general, are substantially larger than in Israel. Most importantly from the standpoint of understanding the dearth of class actions in most other countries around the world, the U.S./Israeli study has helped to identify features of the U.S. system — replicated in Israel — that are necessary to encourage the filing of class actions. These features include an opt-out mechanism, recovery of attorneys' fees on a percentage basis, and representation of class members by the private bar.

Both the United States and Israel have focused heavily on settlement procedures and distribution of proceeds. While their approaches differ significantly (for instance, Israel has a far more liberal cy pres remedy), the goal of both systems is to ensure fairness and integrity so that the class action device can achieve mass justice and deter wrongful conduct — as opposed to merely enriching class counsel. Both countries struggle to realize this goal, and have considered reforming their regimes to this end. Whereas in Israel, such a reform has most recently been enacted, in the United States, a significant amendment to Rule 23 seems unlikely in the near future. Changes are likely to be incremental, not sweeping. Hence, Israel, which until recently followed in the footsteps of the U.S. class action, has now departed in some respects from the American model. It remains for future research to examine whether this move will produce significant differences in the practice of class actions in the two countries.