

Class Actions in the United States and Israel: A Comparative Approach

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Unlike most countries, the United States and Israel have employed the class action procedure for decades. This Article compares the two countries' class action regimes and examines how the device has evolved in those countries. It examines the current procedures, as well as proposed reforms. It also compares class action statistics in the two countries relating to filings and outcomes. We demonstrate the many common features between the United States and Israeli class action procedures. As we illustrate, these common features have led to robust class action practices in both countries. At the same time, there are profound differences between the types of class actions filed and their outcomes. Thus, while Israel has many more class actions than the United States on a per capita basis, the cases are much less consequential from a monetary and subject matter perspective. We explore possible explanations for these observations. Furthermore, this study identifies features — utilized by the United States and Israel — that can serve as models for other countries that are adopting or amending their own class action regimes.

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INTRODUCTION

U.S. class actions have been authorized, in their current form, for more than fifty years. And the device has been recognized as an equitable tool for well over a century. Numerous other countries have adopted class action procedures in recent years, and others are considering adoption of a class action procedure.¹ Yet the number of actual class action cases brought outside the United States remains small. Many other countries have experimented with class actions in one form or another, but most have made little progress. A major stumbling block for many countries is that they do not recognize U.S.-style “opt out” procedures and do not allow contingent fee arrangements where class members have no obligation to pay fees or costs unless the attorneys achieve a recovery.² Also, many countries are resistant to allowing private plaintiffs to represent large numbers of unnamed claimants.³

One country (apart from the United States) with an active class action device is Israel. It has permitted a class action procedure in various situations for more than twenty-five years, and a decade ago it adopted a new Class Action Law,⁴ which has boosted class action litigation. Indeed, on a per capita basis, far more class actions are filed each year in Israel than in the United States — about 1400 per year in Israel for a population of about 8,000,000 versus 12,500 per year (7500 in federal court and about 5000 in state courts) in the United States for a population of about 319,000,000. But there are significant differences between the countries. U.S. class actions are very diversified, including large numbers of class actions involving securities, labor and employment, consumer affairs, civil rights, employee benefits, debt collection, and commercial claims. Many of these cases involve sophisticated litigation and complex factual and legal issues. Israeli class actions, in contrast, are mostly consumer misrepresentation cases, which are simple to file and

1 See *WORLD CLASS ACTIONS: A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE* (Paul G. Karlsgodt ed., 2012) (including discussions on class action and other aggregate procedures in more than thirty countries); see also Lindsey Gomez-Gray, *The Rise of Foreign Class Action Jurisprudence*, AM. BAR ASS’N (Nov. 20, 2012), <http://apps.americanbar.org/litigation/committees/classactions/articles/fall2012-1112-rise-foreign-class-action-jurisprudence.html> (noting that more than twenty-five countries have class action procedures).

2 See Robert H. Klonoff, *Why Most Nations Do Not Have U.S.-Style Class Actions*, CLASS ACTION LITIG. REP. (BNA) 1, 3 (May 22, 2015), <https://law.lclark.edu/live/files/19446-bna-article-2pdf>.

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

4 Class Action Law, 5776-2016, SH No. 2054 p. 264 (Isr.).

litigate.⁵ Moreover, whereas U.S. class actions have resulted in many mega judgments (some involving billions of dollars), Israeli judgments tend to be quite modest.⁶

In this study, we provide a detailed comparison of the U.S. and Israeli class action regimes. We examine the current procedures, as well as the main issues on which reforms are contemplated in both countries. We also compare the empirical realities of class actions by examining statistics relating to their filings and outcomes. We then attempt to explain the major differences revealed by the empirical realities. Such a study is useful to both the United States and Israel in exploring potential reforms. In addition, the discussion may be useful to other countries that are looking for guidance in adopting their own class action mechanisms.

We conclude that the U.S. and Israeli class action procedures share many common features. Most significant among these: both countries permit opt out classes; both require similar conditions for certification, including overall commonality, efficiency and effectiveness of using the class action mechanism, and adequacy of representation; both incentivize plaintiff lawyers by awarding them contingent (mostly percentage) fees when the class prevails or settles; and both recognize concerns about collusive settlements that do not benefit class members. As we demonstrate, these common features have led to numerous class action filings in both countries.

At the same time, there are profound differences between the types of class actions filed and their outcomes. Among those differences: U.S. class actions are primarily brought by large, profitable law firms, whereas in Israel most class actions are brought by solo practitioners and small firms. Moreover, because of the different markets, Israeli class actions generally involve much smaller classes. Thus, while Israel has many more class actions than the United States on a per capita basis, the cases are much less consequential from a monetary and subject matter perspective.

Part I of this Article provides background on U.S. class actions, including history, requirements for certification, attorneys' fees, and settlement issues. Part II provides the corresponding background for Israeli class actions, organized by the same topics as the U.S. discussion. Part III compares statistical data concerning class action filings, outcomes, cy pres distributions, class representative compensation, and the class action bar in both countries. Part IV offers insights based on a comparative analysis of the U.S. and Israeli class action systems.

5 See *infra* Section III.A.

6 See *infra* Section III.B.

I. U.S. CLASS ACTIONS

A. History of the Class Action Procedure

In the United States, under the Rules Enabling Act,⁷ the judiciary has authority to promulgate rules of procedure governing federal courts. A rule change takes effect after its adoption by the U.S. Supreme Court (although Congress is first given a period of time to disapprove of any proposed rule change).⁸

The current U.S. class action rule, Federal Rule of Civil Procedure 23, is a product of this rulemaking process. It is (for the most part) unchanged from the 1966 version of the rule.⁹ But U.S. class actions long predate the 1966 version of Rule 23. Indeed, the first codification of a U.S. class action rule dates back to 1842, with the adoption of Equity Rule 48. That rule authorized representative lawsuits in equitable actions but was largely ineffective because it made clear that any decree was “without prejudice to the rights and claims of all the absent parties.”¹⁰ Equity Rule 38, adopted in 1912, eliminated the

7 Judiciary and Judicial Procedure, 28 U.S.C. §§ 2071-2077 (2006).

8 The bulk of the rulemaking process has been delegated to the Judicial Conference’s Committee on Rules of Practice and Procedure (“Standing Committee”) and its five advisory committees on Appellate, Bankruptcy, Civil, Criminal, and Evidence rules. See *How the Rulemaking Process Works*, UNITED STATES COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> (last visited Feb. 2, 2017). Each advisory committee evaluates proposals for rule amendments in its subject area and seeks permission from the Standing Committee to pursue and publish drafts of potential rule amendments. *Id.* After soliciting comments from judges, attorneys, and the general public, the advisory committees decide whether to transmit a proposed amendment to the Standing Committee. If a proposal is transmitted, the Standing Committee then makes a recommendation to the Judicial Conference of the United States, which is comprised of the chief judge of each federal circuit, the chief judge of the Court of International Trade, and a district judge from each circuit. The Judicial Conference then makes a recommendation to the U.S. Supreme Court. Any amendments approved and promulgated by the Supreme Court take effect no sooner than six months after they are adopted unless rejected, modified, or deferred by Congress. *Id.*

9 The Federal Rules of Civil Procedure were subject to a general overhaul in 1966, with particular attention given to restructuring Rule 23 “along more functional, policy-based lines.” See Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1102-05 (2013).

10 42 U.S.C (1 How.) lvi (1842).

language about the nonbinding nature of the judgment, but courts remained confused about whether — and when — a class-wide judgment was binding.¹¹

The original version of Rule 23, adopted in 1938, was also flawed. It was designed to make class actions available in both legal and equitable proceedings, but it was confusing and difficult to apply. The rule attempted to define three categories of class actions — “true,” “hybrid,” and “spurious” — but these categories were unclear.¹² Most importantly, the 1938 rule carried forward the concern of Equity Rule 48 — that a judgment should not bind an absent class member without the person’s consent. This problem, also known as “one way intervention,” greatly limited the practical value of the class action device.¹³ The current version of Rule 23, adopted in 1966, was designed to eliminate “one way intervention” and also to replace the confusing categories of the 1938 rule with new (and presumably clearer) categorizations.¹⁴

B. Class Certification

1. *Trans-Substantive Nature of Rule 23*

Before we address the specific requirements of the current Rule 23, it is important to emphasize the crucial point that the U.S. class action rule is trans-substantive — i.e., it applies without regard to the type of case.¹⁵ Thus, by way of example, Rule 23 applies to mass tort, insurance, consumer, antitrust, and myriad other types of class actions.¹⁶ To be sure, in rare instances, subject-specific statutes augment Rule 23. For instance, the Private Securities Litigation Reform Act (PSLRA),¹⁷ which was designed to curb meritless securities fraud claims,

11 See, e.g., 1 WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 1.13, at 36 (5th ed. 2011).

12 See, e.g., 1 JOSEPH M. MCLAUGHEN, *MCLAUGHLIN ON CLASS ACTIONS* § 1:1 (13th ed. 2016).

13 *Id.* (“[O]ne of the main goals of the 1966 amendments to Rule 23 was to buttress this central objective of class-wide preclusion.”).

14 Robert H. Klonoff, *The Decline of Class Actions*, 90 *WASH. U. L. REV.* 729, 787 n.328 (2013).

15 See Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 *U. CHI. LEGAL F.* 71, 75 (describing “virtually all of the Federal Rules of Civil Procedure” as well as “Rule 23’s class action device [as] inherently ‘trans-substantive’”).

16 *Id.* (explaining that the class action’s “use should not vary based on differences in the nature of the substantive claim” and citing statutes enforced with the class action device across multiple substantive areas of law).

17 Private Securities Litigation Reform Act, 15 U.S.C. §§ 77z-1, 77z-2, 78j-1, 78u-4, 78u-5 (2016).

establishes several requirements that must be satisfied (in addition to those in Rule 23) to proceed in a securities fraud class action.¹⁸ But statutes like the PSLRA are rare; for the most part, litigants look solely to Rule 23 (and case law under that Rule) in determining the requirements for class certification.

2. Requirements for Class Certification

A series of requirements must be met to achieve class certification. First, there are several threshold criteria that are not spelled out in Rule 23. Second, four requirements are set forth in Rule 23(a). These threshold and Rule 23(a) requirements must be met in all class actions. Finally, Rule 23(b) identifies four categories of class actions. A proposed class action must fall within at least one of those categories. These various requirements are discussed below.

i. Threshold Requirements

At the outset, a plaintiff must satisfy three threshold criteria: (1) an objective class definition, (2) at least one class representative who is a member of the class, and (3) claims by the class representative that are live and not moot.¹⁹ Some courts also require a feasible administrative process for ascertaining class members (a requirement commonly known as the “heightened ascertainability” requirement).²⁰

To illustrate the class definition requirements, a class definition that turns on the class member’s state of mind (e.g., all class members who *believe* that they have been a victim of sex discrimination) would not be proper; and a class alleging “mistreatment” by the defendant would not be sufficiently clear or objective. A heightened ascertainability problem might exist (in courts that have adopted such a requirement) in a suit by consumers against a fast food chain because of contaminated French fries that they allegedly

18 See ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL 422-26 (5th ed. 2017). These include, for example, (1) a requirement that any person seeking to be a class representative file a sworn certification stating (among other things) that the plaintiff has read the complaint and did not buy the security at issue at the direction of counsel; and (2) that the court appoint as lead plaintiff the class members who are most capable of representing the class (presumptively the person or group with the largest financial interest in the case). *Id.*

19 *Id.* at 30-37.

20 See, e.g., *Byrd v. Aarons Inc.*, 784 F.3d 154 (3d Cir. 2015). For a case rejecting the heightened ascertainability requirement, see *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015), *cert. denied*, 133 S. Ct. 338 (2016).

purchased, where virtually no members have receipts or other ways of proving membership in the class.

With respect to the requirement that a class representative must be a member of the class, the pertinent inquiry is whether “the class representative [has] the same basic interests and the same type of alleged injury as the other class members”²¹ The analysis is inherently fact-bound. For example, a putative class complaining about the wording of a government notice could not be represented by an individual who had not received the notice.²² Similarly, an antitrust putative class alleging anticompetitive conduct could not be represented by someone who had not participated in the affected market.²³

The final threshold requirement is that a class representative must have a “live” case or controversy.²⁴ For instance, a woman who had previously settled her sex discrimination claim would not have a live claim. But mootness does not always defeat a representative’s ability to represent the class. The analysis is a complicated and nuanced one, and is beyond the scope of this Article.²⁵

ii. Rule 23(a) Requirements

Rule 23(a) sets forth four explicit requirements that must be met in every class action. A court must conduct a rigorous analysis to ensure that each of these requirements is met.²⁶

First, the class must be “so numerous that joinder of all members is impracticable.”²⁷ Some courts have suggested that there must be at least twenty-five class members, but other courts have found that numerosity was not satisfied even with much larger numbers.²⁸ The reference to impracticability of joinder suggests that geographic distribution of the class is also relevant — with

21 KLONOFF, *supra* note 18, at 43-45 (noting that some courts base this requirement on Rule 23, while others derive it from the “case or controversy” requirement of U.S. CONST. art. III).

22 *Id.*

23 *Id.*

24 *Id.* at 36 (this requirement stems from the “case or controversy” requirement of U.S. CONST. art. III).

25 For instance, the Supreme Court has held that if a class representative’s claim becomes moot after certification is denied, the representative may still appeal the certification; in addition, under the “capable of repetition yet evading review” doctrine of mootness, a class representative may still proceed with a moot claim if the claims of other class members are likely to become moot within a short time as well. See KLONOFF, *supra* note 18, at 45-46.

26 *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).

27 FED. R. CIV. P. 23(a)(1).

28 KLONOFF, *supra* note 18, at 52.

numerosity more easily established when class members are geographically dispersed.

Second, there must be “questions of law or fact common to the class.”²⁹ Even a single question of law or fact will suffice,³⁰ but the inquiry is nonetheless a rigorous one. In *Wal-Mart Stores, Inc. v. Dukes*,³¹ the Supreme Court ruled that the “common contention [must be] of such a nature that . . . determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”³² In other words, the common issue must be central to the case and to the class as a whole.

Third, “the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class.”³³ Here, the focus is on the class representative, who is responsible for representing the unnamed class members. The purpose of typicality is to ensure that there are no unique or troublesome issues involving the representative that could prejudice the class as a whole.³⁴ For example, a class representative in an employment discrimination suit who was terminated after stealing from the company might well be deemed atypical and thus unable to represent the class.

Finally, and related to typicality, the rule requires that “the representative parties will fairly and adequately protect the interests of the class.”³⁵ This requirement applies to both the class representative and class counsel. Again, the concern is to ensure that those representing the unnamed class members do not have serious problems that would detract from that task.³⁶ An atypical class representative would usually be inadequate as well. So would a representative who shows little or no interest in (or knowledge of) the case or who lacks good moral character. Likewise, adequacy issues would arise if a class representative has a conflict of interest (e.g., the representative’s spouse is counsel for the defendant). A lawyer, in turn, might be inadequate as a result of incompetence, dishonesty, or conflicts of interest.³⁷ Rule 23(g), added in 2003, makes clear

29 FED. R. CIV. P. 23(a)(2).

30 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (“[E]ven a single [common] question’ will do.”).

31 *Id.*

32 *Id.* at 350.

33 FED. R. CIV. P. 23(a)(3).

34 KLONOFF, *supra* note 18, at 65 (citing the Supreme Court’s formulation in *Amchem v. Windsor*, 521 U.S. 591, 626 n.20 (1997) and *Dukes*, 564 U.S. at 349 n.5).

35 FED. R. CIV. P. 23(a)(4).

36 KLONOFF, *supra* note 18, at 74-86 (citing numerous factors for class members, as well as class counsel, including “knowledge of the case”; “honesty, good character, and credibility”; and “lack of conflicts”).

37 *Id.* at 81-86.

that the court must appoint class counsel, after finding that counsel will fairly and adequately represent the class. It is uncommon for a representative or counsel to be found inadequate, but such a finding does occur, especially when serious conflicts of interest exist.

iii. Rule 23(b) Categories

In addition to satisfying the three threshold requirements and the four Rule 23(a) requirements, a class action must satisfy one of the four categories of Rule 23(b)(3): (b)(1)(A), (b)(1)(B), (b)(2), or (b)(3).³⁸

Rule 23(b)(1)(A) applies when individual actions “would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class.”³⁹ Although defendant class actions do exist, most class actions are plaintiff class actions, and thus Rule 23(b)(1)(A) is generally designed to protect defendants.⁴⁰ One common example would be a class action to shut down a polluting mill. Individual actions might impose conflicting obligations on a defendant — shutting down the mill, requiring compliance with certain air quality standards, etc.⁴¹ A class action ensures that a defendant will be subject to only a single order. Rule 23(b)(1)(A) does not apply, however, if the only risk is being held liable for damages in one action but not in another.⁴² Although Rule 23(b)(1)(A) is designed to protect defendants, most defendants would prefer not to be subject to a class action.

Rule 23(b)(1)(B), by contrast, is designed to protect the *class members* from being prejudiced by individual adjudications. A class can be maintained under 23(b)(1)(B) if separate adjudications would “be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.”⁴³ For example, if there is a limited fund that is not large enough to compensate all class members, individual lawsuits would risk exhausting the entire fund before a particular plaintiff even has his or her day in court. A class action would ensure that all class members share in the fund (although given the fund’s limited nature, the individual class members would not be fully compensated).⁴⁴

38 *Id.* at 91.

39 FED. R. CIV. P. 23(b)(1)(A).

40 KLONOFF, *supra* note 18, at 93-95.

41 *Id.* at 93-94 (citing this example and others).

42 *See, e.g., In re Dennis Greenman Securities Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987).

43 FED. R. CIV. P. 23(b)(1)(B).

44 For a discussion of the requirements for establishing a limited fund in class actions, see *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

Rule 23(b)(2) authorizes a class action when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole”⁴⁵ *Rule 23(b)(2)* is commonly used in civil rights cases and other cases seeking structural relief, such as an injunction. In *Dukes*, the Supreme Court made clear that (b)(2) is not appropriate if monetary relief constitutes a significant part of the claim.⁴⁶ Indeed, the Supreme Court in *Dukes* has left open the possibility that, even if the monetary claim is only incidental to the declaratory or injunctive claim, (b)(2) might still be inappropriate for the monetary component.⁴⁷

Thus far, three of the four categories have been discussed. All three share two important features: (1) they are “mandatory” in that they do not allow for opt-outs by class members,⁴⁸ and (2) notice of class certification is not required.⁴⁹ By contrast, the fourth category, under *Rule 23(b)(3)*, is an opt-out class and notice of class certification is required.⁵⁰ *Rule 23(b)(3)* is by far the most important (and most frequently utilized) type of class action in the United States, since it is the usual *Rule 23* vehicle for seeking damages.⁵¹ Indeed, class actions seeking extensive money damages are generally *only* susceptible to certification under subsection (b)(3).⁵²

45 FED. R. CIV. P. 23(b)(2).

46 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011).

47 *Id.* at 360 (announcing that past precedent “expressed serious doubt about whether claims for monetary relief may be certified under that provision,” but ultimately not deciding “whether there are any forms of ‘incidental’ monetary relief that are consistent with the interpretation of *Rule 23(b)(2)* we have announced and that comply with the Due Process Clause”).

48 KLONOFF, *supra* note 18, at 232.

49 *See* FED. R. CIV. P. 23(c)(2)(A) (“For any class certified under *Rule 23(b)(1)* or (b)(2), the court *may* direct appropriate notice to the class.”) (emphasis added).

50 FED. R. CIV. P. 23(c)(2)(B) (defining adequate notice as the “[b]est notice that is practicable under the circumstances”). In narrow circumstances, U.S. statutes provide for opt-in classes. *See, e.g.*, KLONOFF, *supra* note 18, at 404 (explaining that class actions alleging discrimination on the basis of age are opt-in classes pursuant to the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1938)).

51 *See* JAY TIDMARSH & ROGER H. TRANGSRUD, *MODERN COMPLEX LITIGATION* 379 (2d ed. 2010).

52 *See* Markham R. Leventhal, *Class Actions: Fundamentals of Certification Analysis*, 72 FLA. B. J. 10, 14 (1998) (“Most class actions seeking substantial money damages will only be appropriate for class certification, if at all, under subsection (b)(3).”).

Rule 23(b)(3) allows the certification of a class when “the questions of law or fact predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”⁵³ The foregoing requirements are commonly known as “predominance” and “superiority.” Predominance is related to commonality but, by its terms, is more stringent because it requires a *comparison* of the common and individual issues.⁵⁴ Superiority focuses on the class action versus alternatives, such as individual litigation or non-class joinder.⁵⁵

In *Eisen v. Carlisle & Jacquelin*,⁵⁶ the Court indicated that, in general, when class members can be identified, they must be notified by regular mail. *Eisen*, however, long predated the internet. Recent proposed amendments to Rule 23 make clear that email or other electronic means may, in many circumstances, suffice.⁵⁷ Nonetheless, the notice program in the United States is often very expensive and, in many cases, requires an expert to establish a protocol.⁵⁸

In addition to the four provisions authorizing class actions, the rule also provides that “[w]hen appropriate, a class may be brought or maintained as a class action with respect to particular issues.”⁵⁹ Issues classes may be brought, for example, for the purpose of determining a specific general liability issue (e.g., whether the product at issue is defective), leaving individualized questions for later resolution by the certifying court or by other courts in separate actions. Although the circuits were at one time in conflict, there now appears to be universal agreement that the predominance requirement of Rule 23(b)(3) does not apply when certification is only for an issues class.⁶⁰

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

54 KLONOFF, *supra* note 18, at 130-33.

55 *Id.* at 143-44 (enumerating several alternative methods of resolution which courts must consider).

56 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

57 See COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 215-16 (2016), http://www.uscourts.gov/sites/default/files/2017-04-civil-agenda_book.pdf (providing that notice may be “by one or more of the following: United States mail, electronic means, or other appropriate means”).

58 See, e.g., *In re Nat’l Football League Players Concussion Injury Litig.*, 301 F.R.D. 191, 203 (E.D. Pa. 2014) (discussing experts for a Notice Plan to reach class members), *appeal dismissed*, 775 F.3d 570 (3d Cir. 2014).

59 FED. R. CIV. P. 23(c)(4).

60 See Patricia Bronte et al., “Carving at the Joint”: *The Precise Function of Rule 23(c)(4)*, 62 DEPAUL L. REV. 745, 745-46 (2013) (arguing that there is no longer

Instead, all that is required is that the resolution of the issue will materially advance the claims.⁶¹

Rule 23 also provides that “[w]hen appropriate, a class may be divided into subclasses that are each treated as a class under this rule.”⁶² Subclasses might be appropriate to ensure manageability when, for example, various subgroups are suing under different states’ laws. When a case involves subclasses, each subclass must meet the threshold requirements and also satisfy Rules 23(a) and (b).

iv. Miscellaneous Procedural and Merits Issues

In addition to the requirements for class certification, a variety of other procedural and merits issues are important to a full understanding of U.S. class actions. These include: burden of proof at class certification; the relevance of the merits to class certification; appellate review of the class certification decision; federalism issues; and the role of discovery, including expert testimony, in the class certification process.

Burden of Proof. At the class certification stage, the burden is on the plaintiffs to show (by a preponderance of the evidence) that all of the requirements for certification have been established.⁶³ In general, this means that plaintiffs must support certification with evidence, not merely allegations. Because of the evidentiary nature of the class certification decision, both plaintiffs and defendants frequently rely on expert witnesses to support their respective positions.⁶⁴ In a number of cases, appellate courts in class actions have focused on issues involving expert testimony.⁶⁵

a circuit conflict regarding Rule 23(c)(4).

61 See, e.g., *In re Nassau County Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006).

62 FED. R. CIV. P. 23(c)(5).

63 See, e.g., *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012).

64 See KLONOFF, *supra* note 18, at 200 (discussing expert discovery).

65 See, e.g., *In re Processed Egg Prod. Antitrust Litig.*, 81 F. Supp. 3d 412 (E.D. Pa. 2015) (determining that an expert economist’s evidence regarding possible collusion due to the conditions of the egg market was admissible for purposes of certification); *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183 (3d Cir. 2015) (holding that a plaintiff may not rely on challenged expert testimony to prove necessary elements of class certification); *Sher v. Raytheon Co.*, 419 F. App’x 887 (11th Cir. 2011) (vacating class certification and remanding to the district court for failure to sufficiently evaluate and weigh conflicting expert testimony on class certification).

Relevance of the Merits. Class certification is not the place to decide the merits. As the Supreme Court stated in 2013, “Rule 23(b)[(3)] requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.”⁶⁶ Courts at class certification should not undertake to determine which side will win the case.⁶⁷ In short, although it is sometimes necessary to touch on the merits in ruling on class certification (where the merits overlap with a certification requirement), in general the assessment of the merits is for summary judgment or trial, not for class certification.⁶⁸

Appellate Review of Class Certification Rulings. Prior to 1998, it was very difficult to appeal a decision granting or denying class certification, because such a decision is not a final judgment. Concerns were raised by the business community, however, that certification — without the possibility of appellate review — placed unfair pressure on defendants to settle.⁶⁹ In 1998, Rule 23 was amended to add a new subdivision (f), which provides that “[a] court of appeals may permit an appeal from an order granting or denying class-action certification” if a request to appeal is filed within fifteen days.⁷⁰ Prior to 1998, most of the key decisions were by trial courts, given the difficulty of securing appellate review. As a result of 23(f), the federal appellate courts have issued many opinions on the criteria for class certification.⁷¹

66 *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013).

67 *See Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) (“[A] court may not say something like let’s resolve the merits first and worry about the class [certification] later.”); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974) (stating that the decision to certify a class under Rule 23 does not “give[] a court any authority to conduct a preliminary inquiry into the merits of a suit”).

68 *Amgen*, 133 S. Ct. at 1194 (“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 Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 505 (6th Cir. 2015) (criticizing Procter & Gamble for “misconstru[ing] Plaintiffs’ burden at the class certification stage”); *Alcantar v. Hobart Serv.*, 800 F.3d 1047 (9th Cir. 2015) (citing *Amgen* and reversing a decision denying class certification); *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750 (7th Cir. 2014) (same).

69 *See Klonoff*, *supra* note 14, at 739 (describing the pressure to settle after class certification as a concern leading to Rule 23(f)).

70 FED. R. CIV. P. 23(f).

71 *See generally Klonoff*, *supra* note 14, at 740-42, 832 (showing statistics on Rule 23(f) and explaining that there are now many important circuit cases).

Federalism Issues. Today, a majority of class actions are heard in federal court (about 7500 in federal court versus 5000 in state court).⁷² That was not always the case, however. Because of difficult jurisdictional requirements to litigate state-law claims in federal courts, plaintiffs could frequently ensure that major class actions were heard in plaintiff-friendly state courts, where judges were usually elected rather than appointed and thus were more beholden to in-state class members than to out-of-state corporations. In 2005, Congress addressed this problem by enacting the Class Action Fairness Act (CAFA).⁷³ CAFA makes it much easier for defendants to remove (transfer) state class actions to federal court, and, for that reason, plaintiffs are now bringing most major class actions in federal court in the first instance.⁷⁴

Class Certification Discovery. As noted, class certification motions are rarely decided on the pleadings alone; as a result, precertification discovery is very common. The high stakes of class certification determinations have led both plaintiffs and defendants to expend considerable resources on precertification discovery strategies.⁷⁵ Discovery in class actions is typically one-sided, with corporate defendants often having thousands (or even millions) of documents stored across a range of systems and locations, and plaintiffs having considerably fewer documents that can be assembled with relative ease.⁷⁶

C. Class Settlements and Dismissals

1. Class Settlements

At one time, virtually all class actions settled (or were dismissed) prior to trial. In the past several years, however, numerous class actions have gone to trial. Those trials have, in many instances, resulted in substantial judgments for the class,⁷⁷ but, in other instances, defendants have won outright.⁷⁸

72 See *infra* Section III.A.

73 Class Action Fairness Act (CAFA), Pub. L. No. 109-2, 119 Stat. 4.

74 For a detailed discussion of how CAFA changed jurisdictional rules regarding class actions, see KLONOFF, *supra* note 18, at 284-89.

75 See Rebecca Justice Lazarus, *Discovery Prior to Class Certification: New Considerations and Challenges*, 9 MEALEY'S LITIGATION REPORT: CLASS ACTIONS 1, 2 (2010) (discussing the role of discovery in the class certification decision).

76 David R. Singh et al., *Effective Discovery Strategies in Class-Action Litigation*, AM. BAR ASS'N (May 26, 2014), <http://www.americanbar.org/litigation/committees/corporate/articles/spring2014-0514-effective-discovery-strategies-class-action-litigation.html> (characterizing this dynamic as "notoriously asymmetric").

77 See Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1643-45 (2016) (citing examples of class action trials since 2014 with judgments ranging from the millions to low billions of dollars).

78 *Id.* at 1642-43 (citing examples of class actions since 2014, seeking multimillion

Nonetheless, despite the recent uptick in class actions going to trial, it is still the case that trials are the exception in class actions (and in other civil cases).⁷⁹ Thus, the rules governing settlement are critical to a full understanding of U.S. class actions. Under Rule 23(e)(2), a court may approve a class-wide settlement only after conducting a hearing and finding that the settlement is “fair, reasonable, and adequate.”⁸⁰ Courts have adopted myriad approaches for determining whether a settlement satisfies that standard.⁸¹

When a class settlement occurs before a class has been certified, the court must also determine that the case meets the requirements for class certification.⁸² The only caveat is that, while “manageability” is normally a component in determining whether a (b)(3) class is superior, that inquiry is not required for a settlement because there will not be a trial.⁸³

2. Settlement or Voluntary Dismissal of the Class Representative’s Claims

Prior to 2003, a number of courts held that court approval was required if a class representative sought to settle or voluntarily dismiss his or her claims prior to class certification, reasoning that a case should be treated as a class action unless and until class certification was denied.⁸⁴ Rule 23(e) was amended in 2003, however, to make clear that court approval is required only of settlement or dismissal of a “certified class.”⁸⁵

dollar awards, in which the defendants received defense verdicts).

79 See Richard Frankel, *The Disappearing Opt-Out Right in Punitive-Damages Class Actions*, 2011 WIS. L. REV. 563, 599 n.144 (identifying empirical evidence showing that the majority of certified class actions are settled).

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

81 See *In re Nat’l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016) (articulating numerous criteria for reviewing the fairness of a settlement); see also *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 369 F.3d 96, 118 (2d Cir. 2005) (detailing different criteria for evaluating a settlement’s fairness).

82 *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997).

83 *Id.* at 620 (“Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.”).

84 See, e.g., *Diaz v. Trust Territory of the Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989) (“[D]uring the interim between filing and certification, a court must assume for purposes of dismissal or compromise that an action containing class allegations is really a class action.”); *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir. 1970) (determining that a class action suit “should be treated as such for purposes of dismissal or compromise, until there is a full determination that the class action is not proper”).

85 2 JOSEPH M. MCLAUGHEN, *MCLAUGHLIN ON CLASS ACTIONS* § 6:1 (13th ed. 2016).

3. Objectors

Because a settlement invariably involves the agreement of (1) class counsel, (2) the class representative(s), and (3) the defendant, the parties to the settlement are not in an adversarial posture when they appear at the fairness hearing. Thus, the court often must rely on objectors (class members and their attorneys who are unhappy with the settlement) to identify potential problems with the settlement's terms. Virtually all proposed class settlements provide for a period of time during which class members and their counsel may lodge objections with the court. Courts take those objections seriously.⁸⁶ Objectors who improve the settlement or provide some benefit to class members may be able to recover fees.⁸⁷

The role of objectors is controversial. It is certainly the case that some objectors are legitimate and important, serving as “guardians of the interests of absent class members.”⁸⁸ On the other hand, a cottage industry of “serial objectors” has emerged, who threaten to prolong the settlement process in order to extort a separate settlement payment to go away.⁸⁹ In recent years, a number of professional objectors have been sanctioned or criticized by courts.⁹⁰ In the past few years, rulemaking efforts have focused on serial objectors (and settlement issues more generally).⁹¹

86 *See In re Volkswagen “Clean Diesel” Mktg., Sales Practices, and Prod. Liab. Litig.*, No. 2672 CRB (JSC), 2017 WL 316165, at *11 (N.D. Cal. Jan. 23, 2017) (addressing “Class Members’ received objections” in considerable detail); *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 659 (2008) (noting the court’s obligation to “entertain any of [the class members’] objections”).

87 *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (“In the absence of a showing that objectors substantially enhanced the benefits to the class under the settlement, as a matter of law they were not entitled to fees.”); *see also In re Cardinal Health, Inc. Sec. Litig.*, 550 F. Supp. 2d 751, 753 (2008) (“An objector to a class-action settlement is not normally entitled to a fee award unless he confers a benefit on the class.”); *Spark v. MBNA Corp.*, 289 F. Supp. 2d 510, 513 (2003) (“[O]bjectors are entitled to compensation for attorneys’ fees and expenses if the settlement was improved as a result of their efforts.”).

88 MARCY HOGAN GREER, *A PRACTITIONER’S GUIDE TO CLASS ACTIONS* 198 (2010).

89 *See, e.g., John E. Lopatka et al., Class Action Professional Objectors: What to Do About Them?*, 39 FLA. STATE U. L. REV. 865 (2012); HOGAN GREER, *supra* note 88, at 199.

90 *See Klonoff, supra* note 77, at 1633 (noting “several recent cases [in which] plaintiffs’ counsel have secured sanctions against objecting counsel”).

91 Henry Kelston, *Class Actions and Rule 23 Amendments: The Road Ahead*, LAW 360 (Apr. 29, 2016, 11:14 AM), <https://www.law360.com/articles/789600/class-actions-and-rule-23-amendments-the-road-ahead> (discussing proposed rule changes).

In federal class actions, CAFA has provided a structure to facilitate objections by government officials. Although U.S. class actions are brought exclusively by private plaintiffs, CAFA provides that, in federal court class actions,

[n]o later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement⁹²

Thus, the pertinent government officials are given the opportunity to provide input into proposed federal court settlements. In practice, however, government officials rarely appear to object to class settlements.

D. Cy Pres

A major issue in class actions, especially in the settlement context, is the permissibility of “cy pres” payments. Cy pres refers to the designation of class members’ recovery to a third party, usually a charitable or public interest organization.⁹³ Courts review cy pres awards as part of the settlement process,⁹⁴ and many have expressed doubt about cy pres awards on procedural, constitutional, and general fairness grounds.⁹⁵

Rule 23 does not address cy pres remedies. However, a publication by a prestigious private law institute, the American Law Institute (ALI), has set forth governing principles for cy pres settlement awards,⁹⁶ and those principles have been followed by most U.S. courts that have considered the issue.⁹⁷ Most

92 Class Action Fairness Act of 2005, 28 U.S.C. § 1715.

93 See, e.g., *In re Citigroup Inc. Sec. Litig.*, 07-CV-9901 (SHS), 2016 WL 4198194, at *3 (S.D.N.Y. Aug. 9, 2016); Chris J. Chasin, *Modernizing Class Action Cy Pres Through Democratic Inputs: A Return to Cy Pres Comme Possible*, 163 U. PA. L. REV. 1463, 1470-74 (2015).

94 See generally *In re Citigroup*, 2016 WL 4198194; *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Perkins v. LinkedIn Corp.*, 2016 WL 613255 (N.D. Cal. Feb. 16, 2016), *appeal dismissed* (2d Cir. Aug. 16, 2016); *In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d 985 (N.D. Ohio 2016); *Keepseagle v. Vilsack*, 118 F. Supp. 3d 98 (D.D.C. 2015).

95 See *Lane v. Page*, 862 F. Supp. 2d 1182, 1230-31 (D.N.M. 2012) (listing four “basic disagreements” with application of the cy pres doctrine and describing the concerns of other courts and commentators).

96 PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 (AM. LAW INST. 2010).

97 See, e.g., *In re Citigroup*, 2016 WL 4198194, at *3 (quoting and adopting the commentary on cy pres proceedings in PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011)

importantly, the ALI proposes that cy pres remedies only be allowed if (1) distributions to class members are impractical (e.g., because the amounts are too small), and (2) the recipient approximates the interests of the class and the purposes of the lawsuit.⁹⁸

The Federal Civil Rules Advisory Committee considered adding provisions to Rule 23 to address cy pres remedies. The model for possible rulemaking was the ALI project, which proposed to severely restrict the circumstances when cy pres could be used. Ultimately, however, the Committee chose not to take action.⁹⁹ One concern was that such an amendment would violate the Rules Enabling Act by changing the substantive law of damages.¹⁰⁰

E. Class Representatives' Compensation

1. Attorneys' Fees

An important part of any class settlement (and any award after trial) is attorneys' fees for class counsel. Rule 23(h), adopted in 2003, authorizes a court in a certified class action to "award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties."¹⁰¹ Class members must be notified of a motion for a fee award "in a reasonable manner,"¹⁰² and they are entitled to object to the proposed fees.¹⁰³ In ruling on fees, a court "must find the facts and state its legal conclusions . . ."¹⁰⁴

(citing PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07, to deny cy pres); *Better v. YRC Worldwide Inc.*, No. CIV.A. 11-2072-KHV, 2013 WL 6060952, at *6 (D. Kan. Nov. 18, 2013) (listing other courts relying on PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION).

98 See *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015) (agreeing with the ALI's approach); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 33 (1st Cir. 2012) ("[T]he recipients should be those 'whose interests reasonably approximate those being pursued by the class.'" (quoting PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07(c)).

99 See Perry Cooper, *Rule 23 Changes Would Curb Power of Class Action Gadfly-The Serial Objector*, CLASS ACTION LITIG. REP. (BNA) 1, 2 (July 8, 2016) (discussing the Federal Rules Advisory Committee's decision "not to tackle" cy pres).

100 See ADVISORY COMM. ON CIVIL RULES, AGENDA MATERIALS TO ADVISORY COMMITTEE ON CIVIL RULES MEETING, PALM BEACH, FL, at 36 (Apr. 14-15, 2016) ("Given the many questions that have emerged in this controversial area, including the necessity of a rule and whether a rule might violate the Rules Enabling Act, the Subcommittee has decided to place [cy pres] on hold.").

101 FED. R. CIV. P. 23(h).

102 FED. R. CIV. P. 23(h)(1).

103 FED. R. CIV. P. 23(h)(2).

104 FED. R. CIV. P. 23(h)(3).

There are two primary methods of calculating fees: (1) the percent of the fund method, and (2) the “lodestar” approach. Under the percentage method, fees are calculated as a percentage of the recovery, with the usual range being twenty to thirty percent.¹⁰⁵ Given that some class settlements involve payments of hundreds of millions (or even billions) of dollars, fees to class counsel under the percentage method can be enormous.¹⁰⁶ Under the lodestar approach, the district court determines the number of hours reasonably devoted to the case by class counsel, and then multiplies that number by a proper hourly rate (which will generally vary depending on the lawyer’s experience and years of practice). The court may then, at its discretion, add a multiplier to account for the risk taken by plaintiffs’ counsel.¹⁰⁷

2. Class Representative’s Incentive Payments

In the settlement (and litigation) context, class representatives are sometimes awarded “incentive payments” for their work. Although courts have often upheld such awards,¹⁰⁸ on occasion, courts have struck down even relatively small payments.¹⁰⁹

105 See, e.g., Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 831-35 (2010) (explaining both methods of calculating fees, giving examples of courts applying each method, and presenting empirical data on percentage-of-recovery awards broken down by subject matter and by circuit).

106 See *id.* at 839 (showing an average of close to eighteen percent attorneys’ fees on settlements ranging from a hundred million dollars to five hundred million dollars and lower percentages of settlements in the one billion to six billion dollars range).

107 *Id.*

108 See, e.g., *Vassalle v. Midland Funding LLC*, 708 F.3d 747 (6th Cir. 2013) (holding that a class representative receiving \$6516.57 in debt relief and incentive payment was fair even though unnamed class members only received a *de minimis* payment of \$17.38).

109 See, e.g., *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948 (9th Cir. 2009) (holding that incentive payments to five class representatives based on the amount recovered by the class “implicate[d] California ethics rules that prohibit representation of clients with conflicting interests”); *Radcliffe v. Experian Info. Sol., Inc.*, 715 F.3d 1157, 1167 (9th Cir. 2013) (holding class counsel inadequate because of agreements with class representatives for incentive payments only if they support the settlement entered into with defendants).

3. *Fee Shifting*

In most class actions, class members pay no fees or costs if they lose. If the class wins, fees of class counsel may be awarded out of the recovery or (in the settlement context) may be paid separately by the defendant to class counsel on top of the recovery paid to the class.¹¹⁰

Under the “American Rule,” parties in U.S. litigation generally pay their own attorneys’ fees regardless of who wins or loses.¹¹¹ That approach applies in class actions as well as non-class cases. The policy animating this rule is access to the legal system.¹¹² That policy is crucial in class actions: if the “loser pays” rule applied, plaintiffs would be discouraged from bringing suit because of the risk of incurring the defendant’s potentially enormous legal bills in addition to their own.¹¹³

II. CLASS ACTIONS IN ISRAEL

This Part reviews the Israeli class action procedure. It follows the same structure as the previous Part, thus using the U.S. procedure as a reference point. It describes the similarities and the differences between the two regimes, as they appear in the “law on the books.” The next Part compares the realities of class actions under both regimes, as they are reflected in filings and outcomes statistics.

110 See KLONOFF, *supra* note 18, at 352.

111 Certain statutes, however, do authorize fee shifting in circumstances in which Congress sought to encourage plaintiffs’ counsel to file meritorious claims in a particular area. See, e.g., Janet Cooper Alexander, An Introduction to Class Action Procedure in the United States, Presentation at Debates over Group Litigation in Comparative Perspective 11, Paper Presented at the Debates over Group Litigation in Comparative Perspective Conference, Geneva, Switzerland (July 21-22, 2000), <https://law.duke.edu/grouplit/papers/classactionalexander.pdf> (discussing fee shifting statutes).

112 See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967):

In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents’ counsel.

113 See, e.g., Martha Pacold, *Attorneys’ Fees in Class Actions Governed by Fee-Shifting Statutes*, 68 U. CHI. L. REV. 1007, 1011-14 (2001) (describing the purposes of fee-shifting and circumstances where fee-shifting is appropriate).

A. History of the Class Action Procedure

Unlike most jurisdictions outside the United States, Israel has had modern (U.S.-style) class actions for more than twenty-five years. The Israeli legislature (the Knesset) has incorporated class action procedures into various substantive laws, designated as specific *class action chapters*. The first law amended to include such a chapter was the Securities Law, in 1988.¹¹⁴ This was followed by similar amendments to the Consumer Protection Law (1994), the Banking (Service to Customer) Law (1996), the Control of Financial Services (Insurance) Law (1997), the Prevention of Environmental Nuisances (Civil Actions) Law (1992), and the Male and Female Workers (Equal Pay) Law (1996).¹¹⁵ Although not identical, the class action chapters were similarly modeled on Rule 23 of the U.S. Federal Rules of Civil Procedure, each prescribing elaborate procedures for class action certification, judicial oversight of settlement, and class representatives' remuneration. However, unlike Rule 23, these procedures were not trans-substantive, as each of them was limited to a specific cause of action.

As it turned out, the substance-specific nature of the class action chapters created significant barriers to class action certification.¹¹⁶ Therefore, plaintiffs and attorneys often tried to apply for class certification outside those statutory arrangements, employing a general procedure set in Rule 29 of the Israeli Rules of Civil Procedure.¹¹⁷ This rule, which originated in Order 15.12 of the English Rules of the Supreme Court, was basically a joinder mechanism.¹¹⁸ It allowed for group representation, without further elaboration of any procedural mechanism for doing so.

Back in 1969, the Supreme Court ruled that Rule 29 may be applied for injunctive relief only, thus barring its use for monetary compensation class actions.¹¹⁹ Hence, certification of a monetary relief class action under Rule 29 became highly unlikely. However, some District Courts found ways around Rule 29's limitations, mainly by bifurcating trials into a liability, class

114 Stephen Goldstein, *Forty Years of Civil Procedure*, 24 ISR. L. REV. 789, 790 (1990).

115 For discussion of these class action chapters, see Alon Klement, *The Boundaries of Mass Tort Class Actions*, 34 MISHPATIM [HEBREW U. L.J.] 301, 333 (2004) (Isr.).

116 *Id.*

117 Israeli Civil Procedure Regulations, 5744-1984, § 29 SH No. 4685 p. 2210 (Isr.).

118 Stephen Goldstein, *The Influences of Constitutional Principles on Civil Procedure in Israel*, 17 ISR. L. REV. 467, 469-70 (1982); Klement, *supra* note 115, at 333-34.

119 CA 76/69 Frankische Pelzindustrie Markle & Co. v. Orel Rabinovitch 23 PD 645 (1969) (Isr.); Klement, *supra* note 115, at 333.

declaratory remedy stage, and a subsequent individual damage award stage.¹²⁰ For several years the Supreme Court has declined to review this practice, and hence, despite being questionable, it has often been used.

In 2003, in *The State of Israel v. E.S.T. Management and Manpower Ltd.*, the Supreme Court reiterated its objection to using Rule 29 for pursuing monetary relief, and that therefore such class actions may be filed only under the specific statutory arrangements, and subject to their substantive requirements. The court has called on the Knesset to enact a comprehensive arrangement for class actions that would substitute for both Rule 29 and the specific statutory chapters.¹²¹

In 2006, the Knesset enacted the new Class Action Law (CAL), which superseded all class action chapters.¹²² In addition, the CAL prescribed more detailed procedures for certification of settlement and voluntary withdrawal,¹²³ as well as more elaborate criteria for awarding attorneys' fees and representative plaintiff remuneration.¹²⁴ It also included many novel procedural arrangements: it conferred the right to represent the class upon nonprofit organizations and a few (specified) state agencies;¹²⁵ it provided the court with an option of certifying an opt-in class action, in which class members should explicitly express their willingness to join the lawsuit in order to be bound by its outcome;¹²⁶ it explicitly allowed for cy pres remedies;¹²⁷ and it established a designated public fund, whose purpose is to help representative plaintiffs in funding class certification motions and class actions, which it deems socially and publicly important.¹²⁸

120 CC (TA) 785/98 Zilbershlag v. El Al (Aug. 11, 1999), Nevo Legal Database (by subscription, in Hebrew) (Isr.); CC (Jer) 109/94 Israel Student Union v. Hebrew Univ. (June 3, 1996), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

121 LCA 3126/00 The State of Israel v. E.S.T. Mgmt. 57 PD 220 (2003) (Isr.), *affirmed*, FH 5161/03 E.S.T. Mgmt. v. The State of Israel 60 PD 196 (2006) (Isr.).

122 Class Action Law, 5776-2016, SH No. 2054 p. 264 (Isr.).

123 *See id.* §§ 16, 18, 19.

124 *Id.* §§ 22-23.

125 *Id.* §§ 2, 4.

126 *Id.* § 12.

127 *Id.* § 20.

128 *Id.* § 27. Since the fund's budget is small (one million shekels, about \$250,000, annually), its ability to facilitate class actions is limited, at best. It should also be noted that securities class actions may be funded only by the Israeli Securities Authority (ISA), which has also designated a small share of its annual budget for this purpose. *See* Securities Law, 5728-1968, § 55(c), SH No. 2655 p. 1087 (Isr.).

B. Class Certification

1. Substance-Specific Nature of the Israeli Class Action

Like the preceding statutory arrangements, the CAL maintained the substance-specific framework, by designating the possible causes of action that may be brought as a class action.¹²⁹ The second addition to the CAL enumerates various causes of action, including consumer, banking, insurance, securities, antitrust, employment, antidiscrimination, disability rights, environmental hazards, restitution of unlawful payments collected by state and public authorities, and anti-SPAM. A class action cannot be certified unless its alleged claims are based on one of these causes of action. Although this substance-specific approach is more limiting than the trans-substantive structure of U.S. Rule 23, the range of possible causes of action is still very broad. Moreover, the substance-specific requirements that preceded the CAL have been, by and large, relaxed, and the admissible causes of action were prescribed in a much broader manner, rendering certification easier, especially in cases involving consumer protection,¹³⁰ banking and insurance, labor and antidiscrimination, and restitution lawsuits filed against unlawful payments collected by state and public authorities.¹³¹

2. Opt-out Class Actions

One important similarity between the class action procedures in both Israel and the United States is the opt-out mechanism. Under the CAL, class members are allowed to opt out of the class following class certification. Any class member who has not opted out is considered to have acquiesced to being represented in the class action, and to be bound by its outcome. The opt-out mechanism is notable since outside the United States and Israel, few countries with class action procedures use such a device. Virtually all require class members to opt *into* the class action; otherwise they are not part of the class. An opt-in approach drastically limits the effectiveness of the device in achieving closure. Since most class members are unaware of class action certification, and since even those who are aware of it usually find it too

129 See Class Action Law § 3(a) (requiring that the cause of action be listed in the second addition to the law).

130 The consumer category is very broadly defined, and may include various causes of action, as long as the lawsuits concerns a claim between a customer and a dealer. A “dealer” is defined in the Consumer Protection Law, 5741-1981, § 1, SH 1023 p. 248 (Isr.), as “any person who, in the course of its occupation, sells assets or provides services, including a producer.”

131 Alon Klement, *Guidelines for the Interpretation of the New Class Action Statute*, 49 HAPRAKLIT [ISR. B. L. REV.] 131, 134 (2006) (Isr.).

burdensome to affirmatively opt out of the class, the opt-out default is crucial to the operation of the class action.

3. Requirements for Class Certification

Israel, like the United States, requires the class action to be certified before it is litigated.¹³² The plaintiff is required to show that the cause of action is one of the causes enumerated in the second addition to the law,¹³³ that he fits one of three possible categories of representative plaintiffs — a class member, a nonprofit organization, or a specifically designated public authority¹³⁴ — and that certification conditions that pertain to the claim and the proposed representative and his attorney are satisfied.¹³⁵ Below we review these requirements, and examine them in comparison to certification conditions in the United States.

The class representative is usually a class member, who claims an individual cause of action. If loss is one of the necessary elements of the cause of action then the plaintiff must also show that he has allegedly suffered such loss.¹³⁶ This is very similar to the U.S. rule. However, there are two additional alternative categories of class representatives, which do not require the representative to be a class member: The representative may be a nonprofit organization, which may represent the class in claims that pertain to its public causes. The organization must also demonstrate that there is a difficulty in filing the claim by a class member, and therefore that its representation is necessary.¹³⁷ Alternatively, the class may be represented by one of three public authorities that are enlisted in the first addition to the law, in claims that pertain to their fields of expertise.¹³⁸ Neither such option exists under the U.S. class action system. Yet, as a matter of actual practice, neither of them turns out to be significant in Israeli practice, as the number of class actions filed by nonprofit organizations is very small, and none has been filed by the designated public authorities.¹³⁹

132 Stuart Clark & Christina Harris, *Multy-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 289, 289, 296 (2001).

133 Class Action Law § 3(a).

134 *Id.* § 4.

135 *Id.* § 8.

136 *Id.* § 4(b)(1).

137 *Id.* §§ 2, 4.

138 *Id.* § 4(a).

139 Nearly all representative plaintiffs — 99.3% — were individual class members. Very few class actions were filed by nonprofit organizations and none were filed by public authorities. See Alon Klement & Keren Weinshall-Margel, *Cost-Benefit Analysis of Class Actions: An Israeli Perspective*, 172 J. INST. & THEORETICAL ECON. 75, 87 (2016). This was criticized in an article authored by Supreme

In order to certify the class action, the court must also find that the following requirements are satisfied: (1) there are substantive common issues of fact or law pertaining to the class; (2) there is a reasonable likelihood that these issues will be decided in favor of the class; (3) litigating the case as a class action will be efficient and fair; (4) the class interests will be adequately represented; and (5) the class interests will be represented in good faith.¹⁴⁰

Most of these requirements correspond roughly to the requirements of Rule 23(a) for certifying any U.S. class, although they are not identical. For instance, “fairness” and “good faith” are implicit in Rule 23, but they are not required by its express terms. On the other hand, “typicality,” which is required under Rule 23, is not required under the Israeli procedure, but is often examined within the “adequacy of representation” requirement.¹⁴¹ Furthermore, even the specific conditions of “superiority” and “predominance,” which are required for certification under Rule 23(b)(3), but have no correlative in the CAL, are actually examined under the requirements that common questions be substantive, and that litigating the case as a class action would be efficient and fair.¹⁴²

It should also be noted that, unlike the different categories of class actions specified by Rule 23(b), the CAL only recognizes one category, which is similar to Rule 23(b)(3). Although the CAL allows for injunctive remedies within this broad category, almost all class actions filed also seek monetary compensation. Hence, class actions that would be categorized under Rule 23(b)(2) are very rare in Israel, and 23(b)(1)(A) and (B) type class actions have never been filed. This should not be taken to imply that such class actions cannot be certified under the CAL, but only means that no such cases have been filed to date.

There are, however, a few notable distinctions between the two countries with respect to certification requirements, which may have a more significant impact on the respective likelihood of certification:

Relevance of Merits. Whereas U.S. courts have, by and large, avoided merits inquiry upon certification,¹⁴³ if those merits do not correspond to other certification requirements, the CAL requires the court to examine the merits of

Court Justice Esther Hayut in Esther Hayut, *The Class Action as a Public-Civil Enforcement Instrument*, 19 LAW & BUS. REV. 935, 940-41 (2016).

140 It should be noted that even if the representative plaintiff does not satisfy requirements that pertain to her cause of action and representation, the court may nevertheless certify the class action and replace the representative. See Class Action Law § 8(a).

141 See Klement, *supra* note 131, at 147-48.

142 See *id.* at 140-41, 145-46; Class Action Law §§ 8(a)(1)-(2).

143 See *supra* pp. 162-63.

the case, and find that there is a reasonable likelihood that these issues would be decided in favor of the class.¹⁴⁴ To satisfy this requirement, the representative plaintiff must provide sufficient evidence; mere allegations will not suffice.¹⁴⁵ Moreover, in many cases courts have required class representatives to support their factual allegations with expert testimony, thus further burdening them with costs.¹⁴⁶ An empirical examination of certification decisions in Israel shows that most certification denials are based on this condition, as the court finds it unlikely that the class would prevail.¹⁴⁷ Hence, this requirement became the main hurdle that class representatives in Israel need to overcome to certify their class action.

Class Definition. U.S. courts have shown increasing scrutiny in examining issues that pertain to the possible identification of class members. Most recently, the two issues of “ascertainability” and “no-injury” classes have posed significant hurdles for class certification. In contrast, the Israeli Supreme Court has repeatedly emphasized that class member identification should not pose a problem for certification, because section 20(c) of the CAL allows the court to substitute cy pres transfers for class compensation, if the latter cannot be effectively distributed to the class.¹⁴⁸ We discuss the different approaches to cy pres in Israel and in the United States below. Here, we only suggest that the lenient Israeli approach renders class action certification much easier in this respect.

Notice. In both countries, if the court finds that all certification requirements are satisfied then it may issue a certification order, which defines the class, appoints the class representative and the class attorney, identifies the causes of action and the common questions of fact and law, and enumerates the

144 See Class Action Law § 8(a)(1).

145 LCA 3489/09 Migdal Ins. Co. Ltd. v. Metal Co. Ltd. Emek Zevulun ¶ 41 (Apr. 11, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (Barak-Erez, J.); CA 5378/11 Frank v. Allsale ¶¶ 3-4, (Sept. 22, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (Hayut, J.).

146 CA 5378/11 Frank ¶ 4; CA 7141/13 Connective Grp. Ltd. v. Dabush ¶ 12 (Nov. 5, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (Barak-Erez, J.).

147 It should be noted that thirty-four percent of the rejected requests were denied because the court determined it would be unlikely to decide the collective question in favor of the class. However, the percentage is even higher — in cases where the court rejected the motion and determined that the class representative lacked personal grounds, it also found that there is at least one additional reason for rejection, and that reason is frequently a finding that the matter will be decided in favor of the group. See Klement & Weinshall-Margel, *supra* note 139, at 20.

148 See LCA 6897/14 Kol Barama v. Kolech ¶ 4 (Dec. 9, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (Danziger, J.).

requested remedies.¹⁴⁹ Yet, unlike the U.S. requirement for individual notice of class certification (“best notice practicable under the circumstances”),¹⁵⁰ Israeli law only requires public notice, most often in newspapers. The practice is to publish class certification notices in small print, in the back pages of three newspapers, and therefore most class members are usually unaware of them. Moreover, under Israeli practice, defendants bear the (usually small) costs of this notice. Hence, in this respect too, U.S. practice, which requires the costs of individual notice to be borne by the class representative, is much more burdensome for her.

Appellate Review of Class Certification Rulings. A certification decision is subject to interlocutory appeal. Unlike the current Federal Rule 23(f), which conditions such an appeal on permission of the appellate court, in Israel such permission is required only for appealing a decision granting certification. In contrast, a decision denying the class certification is subject to appeal as of right.¹⁵¹ The Supreme Court has ruled that appeal over certification would be allowed only if the defendant demonstrates that allowing it to stand would cause it significant harm, that his chances of winning the appeal are sufficiently high, and that the number and complexity of the issues that are left for the lower court to decide in the class action are significantly greater than the number and complexity of questions that have been resolved in the certification decision, and therefore stand for review on appeal.¹⁵²

Class Certification Discovery. Discovery in Israel is very limited in comparison to the United States. This is true both for ordinary litigation and for class actions. However, in class actions, discovery is even more restricted, prior to certification. The Israeli class action procedural rules require the representative plaintiff to support a pre-certification motion for discovery with evidence which presumptively demonstrates that class certification conditions are satisfied.¹⁵³ Although courts vary in the extent of discovery they allow, the evidentiary burden to be lifted, prior to discovery, renders it difficult to obtain.

149 See Class Action Law § 14(a).

150 See *supra* text accompanying note 50.

151 LCA 8761/09 Cellcom v. Fatal ¶ 2 (May 6, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (Grunis, J.).

152 *Id.*

153 See Israeli Class Action Rules of Procedure, 5766-2006, § 4(b), 35 LSI 298 (2010) (Isr.); LCA 8224/15 Tnuva Coop. Ltd. v. Prof. Zelicah ¶ 11 (Mar. 29, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (Hayut, J.).

C. Class Settlements and Dismissals

Most class actions in Israel are resolved either through settlement or voluntary dismissal, before class certification.¹⁵⁴ This Section reviews the procedures for reviewing settlements and voluntary dismissals and the requirements for approving them. Since these procedures were amended in 2016, following public dissatisfaction with the way they were applied,¹⁵⁵ we also describe the underlying goals of this amendment, and its expected implications.¹⁵⁶

1. Class Settlements

The settlement approval procedure in Israel is similar to the U.S. procedure. When the parties move the court to certify a settlement class, notice must be given to all class members, allowing them to file an objection to the settlement, or to request to opt out of the class action.¹⁵⁷ In Israel, unlike the United States, the court must refer the settlement to an independent examiner, who submits a detailed report reviewing the adequacy of the settlement.¹⁵⁸ The examiner must not be appointed or recommended by any of the parties, in order to guarantee its independence and to avoid any pressure from the parties to approve the settlement against the public interest. It should be mentioned, however, that although the United States has no requirement for an independent examiner, it is not uncommon for the parties to retain independent experts to advise the court.¹⁵⁹

154 See Klement & Weinshall-Margel, *supra* note 139, at 92; sources cited *infra* note 155.

155 See Sapir Khalfon & Sapir Peretz, *How Did Several Outstanding Class Action Lawsuits in Recent Years End?*, GLOBES (Apr. 20, 2015), <http://www.globes.co.il/news/article.aspx?did=1001029379> (Isr.); Nurit Rott, *Class Actions: Too Many Settlements, Too Little Compensation for Customers*, HAARETZ (Mar. 24, 2010), <http://www.haaretz.co.il/misc/1.1194663> (Isr.); Mark Sean, *How Much Does It Cost to Defend Against a Class Action?*, CALCALIST (Mar. 3, 2009), <http://www.calcalist.co.il/local/articles/0,7340,L-3246542,00.html> (Isr.).

156 See Draft Bill Amending the CAL Settlements and Voluntary Dismissals Procedure, 5777-2016, HH (Knesset) No. 637, p. 116, https://www.nevo.co.il/law_word/Law16/knesset-637.pdf (Isr.).

157 See Class Action Law, 5776-2016, §§ 18(c)-(d), SH No. 2054 p. 264 (Isr.)

158 *Id.* § 19(b)(1).

159 For instance, Professor Klonoff has served as an expert in numerous class settlements, including the BP Deepwater Horizon oil spill class action, the National Football League concussion class action, and the Volkswagen “clean diesel” class action.

Following these procedures, the Israeli court must hold a fairness hearing and decide whether to approve the settlement, condition its approval on necessary changes, or reject the settlement.¹⁶⁰ If the settlement is approved, the court awards class representative's compensation and attorney fees. Although the parties may agree on these fees, they may not condition their agreement to the settlement on them, and (just as in the United States) the court has full discretion to decide the fees, irrespective of the parties' agreed proposal.¹⁶¹

As is true in the United States, the Israeli court may approve a settlement only if it finds that the settlement is adequate, fair and reasonable, in view of class members' rights and interests.¹⁶² When deciding whether to approve the settlement, the court should address the following considerations: (a) the difference between the value of the settlement remedy and the value of the remedy to which class members would be entitled if the court had decided the class action in their favor; (b) objections submitted to the settlement; (c) the procedural stage at which the settlement was submitted for approval; (d) the special examiner's opinion; (e) the risks and opportunities in proceeding with litigation, compared to the pros and cons of the settlement; and (f) the causes of actions and remedies that would be precluded by the settlement.¹⁶³ These criteria are similar to those used by U.S. judges in assessing a class settlement.

If the settlement was submitted for approval before the class action was certified then, prior to the last amendment of the CAL, the court was required to find also that the claim purportedly satisfies all certification requirements. Among these requirements, the ones that were most likely to affect courts' settlement approval decisions, as they were not considered prior to the amendment, were the requirement for adequate and good faith representation, as well as the requirement to show a reasonable likelihood that common issues would be decided in favor of the class.¹⁶⁴

Before the 2016 amendment, the court only had to find that there were substantive common issues of fact or law pertaining to the class, and that resolving the litigation through settlement was efficient and fair.¹⁶⁵ However, pre-certification settlements have raised two major concerns. First, from a theoretical perspective, since these settlements were concluded before class action certification, there was no guarantee that the interests that are supposed

160 See Class Action Law § 19(d)(1).

161 *Id.* § 19(f).

162 *Id.* § 19.

163 *Id.* § 19(c)(2).

164 *Id.* § 19(a).

165 *Id.* § 19(a).

to be protected by the certification requirements were indeed secured.¹⁶⁶ Second, as an empirical matter, the ratio between the initial claim made and the actual remedy awarded, mostly in pre-certification settlements, was very high. Between 2006 and 2012, the median ratio was 18 for monetary transfers, 32 for coupons, and 185 for cy pres awards.¹⁶⁷ These figures demonstrate either that settlements were prohibitively low compared to the true value of the claims, or (more likely) that class action claims were highly inflated.¹⁶⁸ Irrespective of the correct interpretation, both compromise the objectives of the CAL.

To remedy these problems, the 2016 amendment revised the requirements for approval of pre-certification settlements. Courts are expected to examine the merits of the alleged claims and reject any settlement in which those merits are questionable. This would mark a significant change from past court decisions, which justified approval of low settlements by referring to

166 In particular, those requirements are intended to secure adequate representation, on the one hand, and discourage filing of frivolous suits, on the other hand, through direct examination of the claim and the representatives. The procedures and requirements for settlement approval, in contrast, are intended to guarantee the settlement's adequacy, by comparing it to the expected outcome in litigation. Claim value and quality of representation are often assumed as given, in this comparison. This is most problematic with respect to protection of defendants against frivolous lawsuits. If a lawsuit has little merit, then a low settlement value may be fully justified, and therefore should be approved. This reasoning was applied by many courts when approving low value settlements. *See* DC (TA) 8374/06 1429-06 Brut v. Menora Ins. Co. Ltd. 15 ¶ 11 (July 4, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.); CC (TA) 2383/06 Dana v. The Isr.-Am. Gas Co. 8 (Jan. 27, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.). However, this implies a lower barrier against filing such lawsuits, contrary to the legislator's intention in requiring a minimum likelihood of success as a condition for class action certification.

167 *See* Klement & Weinshall-Margel, *supra* note 139, at 93-95. These figures are based on the value declared in the motion to certify the settlement. Hence, the actual ratios are even higher, especially in coupon settlements, whose redeemed value was often far lower than their nominal value, due to very low percentages of realization by class members. *See* Alon Klement, *The Gap Between the Perceived and Actual Value of Settlements in Class Actions*, 20 LAW & BUS. REV. 1 (2016).

168 This is very likely, since no fee is paid for filing a class action, unlike other civil cases, in which the plaintiff must pay a filing fee equal to 2.5% of the value of her claim. It should be noted, though, that section 23 instructs the court, when awarding attorney fees, to consider the difference between the remedies claim and the remedies actually awarded.

the claims' low likelihood of success.¹⁶⁹ Furthermore, a wide discrepancy between the claim's value and the settlement value might presumptively signal that either the settlement value is too low, in which case the adequacy of representation is questionable, or the likelihood of deciding the case in favor of the class is low. In either case, this would justify rejection of the settlement. Moreover, if these provisions are to be strictly implemented by judges, they would undermine plaintiffs' willingness to move forward with the motions to certify the class action, given their low probability of success.

Thus, the additional requirements for pre-certification settlement approval are intended to deter plaintiffs from filing meritless class actions. At the same time, they also incentivize class representatives to bargain for better settlements for class members. Just as in voluntary dismissals, here too the additional requirements serve as commitment mechanisms. They prompt defendants and courts to reject settlements in meritless suits, thus deterring plaintiffs from filing them. And they allow a class representative whose claims are sufficiently strong better leverage over defendants in pre-certification settlement negotiations.

2. *Voluntary Dismissal of the Class Representative's Claims*

The CAL requires not only class action settlements but also voluntary dismissals to be approved by the court, whether filed after a class action or before it. Whereas approved settlements create a *res judicata* over the defendant and all class members, voluntary dismissals have no binding effect. Therefore, the procedure for approving voluntary dismissals is much less elaborate and demanding.

If the representative plaintiff or her attorney move the court to voluntarily dismiss the class action, before or after it was certified, the court may decide that litigation should nevertheless be maintained, and may replace the class representative or the class attorney. Otherwise, the court should approve the dismissal.¹⁷⁰ The court must also review any payoff received in connection with the voluntary dismissal by the class representative or her attorney.

A major critique of Israeli class actions has been that many of them are often based on frivolous claims, which benefit no one but the class action attorney. This critique is mainly based on the high percentage of motions to certify a class action that have been voluntarily dismissed by the representative

169 See Class Action Law § 19(a); Draft Bill Amending the CAL Settlements and Voluntary Dismissals Procedure, 5777-2016, HH (Knesset) No. 637, p. 116, https://www.nevo.co.il/law_word/Law16/knesset-637.pdf (Isr.).

170 See Class Action Law § 16.

plaintiff before certification (fifty-seven percent),¹⁷¹ whereas attorneys and class representatives were still compensated in these cases.¹⁷²

Some judges have expressed their dissatisfaction with this reality. One Tel Aviv District Court judge has decided that no attorney fee should be awarded in voluntary dismissals, even when they have led defendants to change their behavior.¹⁷³ The 2016 amendment aims to distinguish between two types of voluntary dismissals: those that are manifestly frivolous, and those that allegedly had merit and led the defendant to change its purported illegal conduct. The court is instructed, when awarding representative compensation and attorneys' fees following a voluntary dismissal, to consider first whether the claim has presumptively shown a valid cause of action,¹⁷⁴ and second, the extent to which filing the class action has benefited class members.¹⁷⁵ Thus, the amendment seeks to deter plaintiffs from filing meritless suits in the hope of earning a fee upon voluntarily dismissing them. It also incentivizes

171 About sixty percent of the voluntary dismissals were submitted after the plaintiff recognized that the probability of a favorable judgment for the class was low. *See* Klement & Weinshall-Margel, *supra* note 139, at 93.

172 Although the average compensation was very small, about 13,600 NIS (about \$3400) for class representatives and 35,000 NIS (about \$8750) for class attorneys, it is still very difficult to justify. Moreover, such compensation possibly incentivized more frivolous filings, especially by lawyers whose time's reservation value was low, thus further aggravating the problem. *See* Klement & Weinshall-Margel, *supra* note 139, at 97.

173 *See* CA (TA) 39176-07-13 Levy v. Pasta Nona (Nov. 26, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.). It should be noted that about twenty percent of the voluntary dismissals were justified by the defendants' compliance with their alleged legal obligations after the class action was filed, thus rendering litigation moot. Hence, these cases may have contributed to law enforcement, and it is questionable whether they should be categorized as frivolous. Hence, the District Court's decision was criticized, *see, e.g.*, CA (HA) 27043-06-14 Hazan v. "Yaad" Fuel Company Ltd. (Dec. 9, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.), and although it was followed by some judges, others fiercely objected to it. They considered defendants' resultant compliance a favorable outcome, which justifies compensation of the class attorney and the class representative.

174 This requirement applies only if the voluntary dismissal is made before class certification. It is clearly redundant after certification, since one of the certification requirements is that the court finds that there is a reasonable likelihood that the common issues would be decided in favor of the class.

175 *See* Class Action Law § 23(c).

representative plaintiffs to insist on conferring an actual benefit on the class, even when the case is voluntarily dismissed.¹⁷⁶

3. Objectors

According to CAL section 18(d), objections to class action settlements may be filed by class members. In addition, before the 2016 amendment, objections could also be filed by nonprofit organizations, provided that they had been pre-certified for this purpose by the Minister of Justice. Finally, the Attorney General (AG), as well as regulatory agencies whose supervisory responsibilities involve the subject matter of the class action, are notified about every proposed class action settlement and may file a brief to the court, reviewing the settlement.¹⁷⁷ As noted, in the United States, government officials are similarly notified regarding class action settlements.¹⁷⁸

Between 2006 and 2012, objections were filed in only eight percent of class settlements, half of which were filed by class members, and the other half by nonprofit organizations.¹⁷⁹ This low percentage comes as no surprise. As far as class members are concerned, their interest in the class action settlement is usually very small, and therefore it does not justify their investment in reviewing the proposed settlement and objecting to it. Moreover, since the CAL does not require personal notice, most class members are often unaware of the settlement agreed on their behalf.

As for nonprofit organizations, in the first ten years of the CAL, only nine such organizations have been certified by the Minister of Justice.¹⁸⁰ Moreover, these organizations usually have been unaware of class action settlements, and even if they were, they lacked the expertise and the resources to file objections and litigate them.

In that same period, the AG has submitted briefs in seventy percent of the proposed class action settlements, fifteen percent of which included objections to settlement approval. The court has approved the proposed settlement without changes in seventy-four percent of the cases in which the AG has filed a brief but has not objected, and in eighty-four percent of the settlements regarding which the AG filed no opinion. In contrast, the court

176 The U.S. approach is very different, with no requirement of court approval for dismissing a case prior to certification. See MCLAUGHEN, *supra* note 85.

177 See Israeli Class Action Rules of Procedure, 5766-2006, §§ 18(c)-(d), 35 LSI 298 (2010) (Isr.).

178 See *supra* note 92 and accompanying text.

179 Klement & Weinshall-Margel, *supra* note 139, at 92-93.

180 Letter to Adv. Elad Mann, from Ministry of Justice, Freedom of Info. Supervisor (Sept. 28, 2016) (Isr.) (on file with authors).

has approved without changes only twenty-five percent of the settlements to which the AG objected.¹⁸¹

Thus, two observations follow: First, objections have rarely been filed, either by class members or by nonprofit organizations. This is probably due to the absence of information regarding class action settlements, and the lack of sufficient incentives and resources for filing objections. Second, the importance of facilitating adversarial deliberation in class action settlements is suggested by the correlation between the AG's briefs and the court's decision whether or not to approve the settlement.¹⁸²

The importance of objections in guaranteeing fair and adequate settlements has also been recognized by the Supreme Court.¹⁸³ The Court has suggested that objections are necessary, in appropriate cases, to overcome the agency problem inherent in class action settlements, and to provide the court with the perspectives of unrepresented class members. The Court has indicated that objectors' compensation should be structured to provide adequate incentives to object, on the one hand, yet deter meritless objections, on the other.

In view of these considerations, the 2016 amendment sought to expand the right to object to class action settlements, and to better incentivize objectors. The requirement for certification of nonprofit organizations for this purpose by the Minister of Justice was removed.¹⁸⁴ In addition, the right to object was extended to any "person who acts in the interest of class members." Thus, procedural barriers to submitting objections were minimized.

To incentivize objectors, the amendment explicitly provided that they may be rewarded for filing their objection, if the court accepts their claims, in whole or in part. Yet, in awarding the objector, the court must also consider the benefit that the objection conferred upon class members. In order to

181 See Klement & Weinshall-Margel, *supra* note 139, at 92-93.

182 It should be noted that since the AG may have been more likely to object to settlements which in its opinion did not satisfy the conditions for approval, the correlation between its opinions and the courts' decisions does not necessarily demonstrate a causal connection.

183 See CA 7809/12 Dr. Hazan v. Club Hotel Int'l (Dec. 31, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.); Alon Klement & Keren Weinshall-Margel, *Class Actions in Israel: An Empirical Perspective*, 45 MISHPATIM [HEBREW U. L.J.] 707, 752 (2016).

184 The amendment also removed a similar certification requirement for a nonprofit organization that wants to intervene in a class action. This change, too, was intended to facilitate such organizations' involvement in class actions, even in their early stages. See Draft Bill Amending the CAL Settlements and Voluntary Dismissals Procedure, 5777-2016, HH (Knesset) No. 637, p. 116, § 15, https://www.nevo.co.il/law_word/Law16/knesset-637.pdf (Isr.).

deter frivolous objections, as well as extortionist behavior by objectors, the amendment conditioned objectors' right to withdraw their objection on the court's approval. It also required that the court approve any consideration conferred upon objectors in relation to their objection.

Thus, the amendment creates a procedural framework that is intended to encourage objections to inappropriate settlements, but at the same time deter their indiscriminate use. This framework recognizes the importance of adversary deliberations and the lack thereof in settlement approval procedures. It also acknowledges that the problems that undermine the value of class actions — agency problems and frivolous suits — might similarly impact objections to settlements. Therefore, court monitoring and properly structured incentives were built into the procedural framework of class action settlement objections, to overcome these problems.

D. Cy Pres

Section 20(c) of the CAL provides that whenever individual compensation of class members is impractical, either because they are too costly to identify and be paid, or for any other reason, the court may award an alternative remedy, for the benefit of the class or the public at large. Thus, the CAL allows the court to substitute cy pres transfers for class compensation, if the latter cannot be effectively distributed to the class.¹⁸⁵

The Supreme Court has ruled that section 20(c) applies not only to judgments but also to class action settlements.¹⁸⁶ Moreover, it has ruled that although this section applies at the back end, when litigation concludes, it also impacts initial class action certification, as it allows the court to certify a class action even if it is evident that class members cannot be effectively identified. The Supreme Court reasoned that this provides the flexibility necessary to realize the objectives of the CAL, most prominently deterrence and law enforcement.¹⁸⁷

This provision has been frequently applied in class action settlements. Out of 250 cases between 2006 and 2012 in which some remedy was distributed to the class,¹⁸⁸ 96 included a cy pres award. The average award was NIS 304,900

185 LCA 6897/14 Kol Barama v. Kolech ¶ 4 (Dec. 9, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

186 See CA 1644/15 Eyal Gur v. Dor Alon Energy (1998) Ltd. (May 27, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

187 See LCA 6897/14 Kol Barama ¶ 44 (Danziger, J.).

188 These consist of 180 settlements, 25 voluntary dismissals, 9 judgments, and 36 cease-and-desist decisions. See Klement & Weinshall-Margel, *supra* note 139, at 93.

(about \$76,000) and the median was NIS 90,000 (about \$22,500). Those awards were transferred to various social causes including medical aid and disabled organizations (forty-two percent of these cases), charities (twenty-one percent), and educational organizations (seven percent). An examination of these awards reveals no apparent proximity between their recipients and the represented class, cause of action or defendant type. They were usually designated by the settling parties, without direct involvement by the court.

As the practice of cy pres awards, often termed “donations,” in settlements has become more frequent, doubts have been raised with respect to the extent they indeed realize their purported deterrent goal. Anecdotal evidence suggests that in many instances the defendant would have made similar donations irrespective of the class action.¹⁸⁹ Moreover, defendants have often enjoyed reputational gains when making these donations, thus further diluting their deterrent effect.

Some courts have recognized these manipulations and required settling parties to demonstrate that the recipients of cy pres awards had no prior association with them. Defendants have also been required to certify that their contribution according to the settlement adds to their prior philanthropic commitments, and does not substitute for them.¹⁹⁰ However, courts have been hesitant to get more actively involved in determining the identity of the award’s beneficiaries. They consider such a proactive involvement to be an overreach of their inherent judicial institutional limitations.¹⁹¹ Legislative action has therefore been called for.

The 2016 amendment established a designated public fund, responsible for the administration and distribution of cy pres awards. All cy pres awards in class actions, as well as unclaimed damage awards which do not revert to the defendant, are to be transferred to this public fund.¹⁹² A court deciding on cy pres awards should specify in its judgment, or its approval of a settlement, a public cause which bears sufficient relation to the subject matter of the class action, to which the award would be allocated. The public fund is overseen by the Administrator General and administered by a five-member committee, which is responsible for the distribution of the funds received.¹⁹³ Potential

189 CC (CT) 44751-03-10 Ben-Simon v. Hot Commc’n Sys. Ltd. (July 22, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

190 See CC (TA) 22236-07-11 Shrayar v. Automatic Bank Serv. Ltd. (Sept. 16, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

191 *Id.* at 8-10, ¶¶ 16-20.

192 See Class Action Law, 5776-2016, § 27a, SH No. 2054 p. 264 (Isr.).

193 The members of the committee are: a chairman qualified to be a district court judge, who is not a state employee; a representative of the Administrator General; a representative of the Attorney General; two members of the committee shall

recipients may apply to the fund, and the committee is supposed to select recipients among those applications, which match the public causes specified in the court's judgment, and distribute the awards accordingly. This approach contrasts dramatically with the prevailing law in the United States, which generally favors direct payments to class members over cy pres awards and, in any event, generally requires a close connection between the award recipient and the underlying claims in the lawsuit.¹⁹⁴

By denying the parties, especially defendants, the discretion to decide who receives the cy pres awards, the amendment prevents them from manipulating these awards. Cy pres awards become equivalent to liability payments, or for that matter, to civil fines. There is no discrepancy between their perceived and their actual cost to the defendant. When the court awards them, or certifies a settlement in which they are awarded, the defendant's actual liability equals that award, and its actual cost to the defendant will not be lower.¹⁹⁵

Furthermore, courts are relieved of the burden of allocating cy pres funds. Adjudication is designed to decide disputes between litigants, based on the legal merits of their claims. In contrast, allocation of cy pres awards presumptively requires the court to compare their alternative uses, based on their social desirability and other non-legal considerations. Judges are not trained in rendering such social choice decisions, and the judicial process is not meant to be used for making them. They are to be made by regulatory bodies, based on broad criteria which do not necessarily depend on the specifics of each case. The public fund is, therefore, a far more adequate mechanism for implementing such allocations.

E. Representatives' Compensation

Both class attorneys and class representatives are remunerated if the class prevails or if the class action settles. Since under the Israeli Rules of Civil Procedure the winner's litigation costs are reimbursed by the loser, the class representative's compensation and the attorneys' fees are paid by the defendant. Conversely, if the defendant prevails, either on the motion to certify a class action or in the subsequent litigation, the class representative might be ordered to pay the defendant's costs and attorneys' fees.

be appointed from among the public or one from among the public and the other from among the state employees. Section 27a(e) refers to conditions that should be applied to a member from among the public.

194 See *supra* text accompanying note 98.

195 Klement, *supra* note 167.

1. Attorneys' Fees

The CAL specifies the considerations that should be taken into account when awarding attorneys' fees.¹⁹⁶ These include the time invested in the litigation, the litigation risk, the benefit delivered to the class, and the public importance of the case. In addition, there are unique considerations for awarding class attorneys' fees, which include the case's complexity, the way it was litigated, and the difference between the remedies sought and the actual remedies awarded to the class.

Although the Israeli Supreme Court, like U.S. courts, has recognized the two methods for awarding attorneys' fees in the United States — the lodestar and the percentage fee — it decided that as a general rule, courts should use the percentage fee in monetary remedy class actions.¹⁹⁷ The Supreme Court reasoned that the lodestar hourly fee would aggravate the attorney's agency problem, encourage unnecessary time investment, and necessitate time-consuming monitoring by the court. In contrast, the percentage fee would align, to a large extent, the interests of the attorney and the class, and it would not require costly ex-post accounting of the time spent on the case. The Court further required that the percentage decline as the total award to the class increases, and that the fee be calculated based on the actual amounts realized by the class, as opposed to the (usually higher) amounts allegedly awarded in settlement or judgment. It should be noted that although the lodestar method is available in the United States, most American courts similarly prefer the percentage method over the lodestar.¹⁹⁸

2. Class Representatives' Compensation

Notably, class representatives are awarded substantial amounts, largely exceeding the value of their individual claims and their actual costs. This stands in stark contrast to the U.S. practice of awarding class representatives "incentive" payments, which are not frequent and usually are not substantial. The considerations that should be taken when awarding class representative compensation are similar to those enumerated for attorneys' fees.¹⁹⁹

3. Class Representatives' Risks: Fee Shifting and Litigation Costs

Under Israeli procedure, the loser on trial must reimburse the winner for her litigation costs and attorneys' fees (often termed the "English Rule"). Hence, class representatives risk paying the defendants' costs if defendants prevail.

196 See Class Action Law § 23(b).

197 CA 2046/10 Shemesh v. Raichert 60(2) PD 681 ¶ 5 (2012) (Isr.).

198 See Fitzpatrick, *supra* note 105, at 832.

199 See Class Action Law § 22.

Furthermore, class representatives must bear all out of pocket litigation costs, including the high costs of expert opinions. Under Israeli rules of lawyer professional ethics, lawyers cannot advance their clients' costs (including expert fees).²⁰⁰ Hence, the risks and costs borne by the representative plaintiff can be very substantial.²⁰¹ As noted, U.S. class representatives do not bear similar risks. There is usually no fee shifting, and in any event, lawyer time and costs are almost always absorbed by class counsel, not by the class representative, in the event that the class loses the case. Thus, in the U.S. the risk is borne entirely by class counsel, not by class representatives. In both regimes, however, the lion's share of the litigation investment is borne by the attorney, as he works on the case without being reimbursed for his time by the class representative, winning remuneration only if the case is won or settled.

III. COMPARING CLASS ACTION PRACTICE IN THE UNITED STATES AND ISRAEL

After comparing the Israeli and the American class action procedures, we now examine how these procedures are actually practiced. We compare key statistical findings that describe class action realities in both countries.

A. Class Action Filings

In the ten years since its enactment, the CAL has generated a significant amount of class action litigation in Israel. As Figure 1 demonstrates, the number of class action filings has grown from 28 in 2006, to 1430 in 2015.²⁰² This is an extraordinary number for a country the size of Israel (with a population of about eight million), and on a per capita basis it indicates a much higher frequency of class actions than in the United States (with a population of 319,000,000), where (according to very rough estimates) on average, about

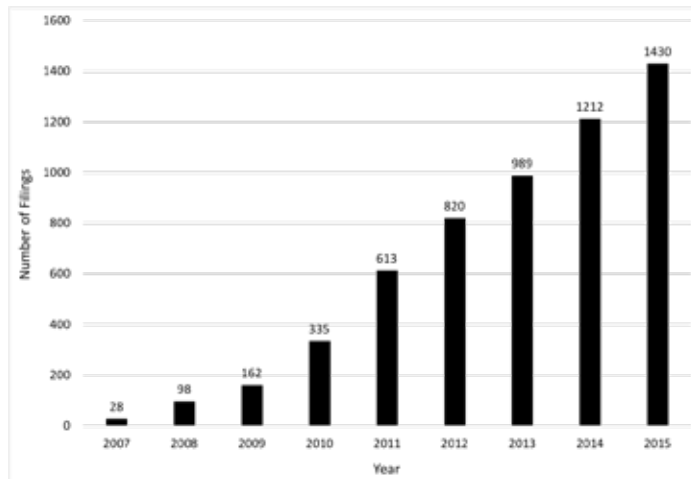
200 See Israeli Bar Association, Professional Ethics Rules § 44 (1986).

201 In CA 2729/14 *Aroma Espresso Bar Ltd. v. Najam* (Mar. 24, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.) it was held by the Supreme Court that high costs in favor of defendants would be determined in case the claim was filed in bad faith. In LCA 5188/16 *IDB v. Cabiri* (Jan. 28, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.) the Supreme Court tripled those costs.

202 The yearly statistics refer to the number of filings between September of the preceding year to the end of August, in each year. See Klement & Weinsall-Margel, *supra* note 139, at 84.

12,500 class actions are brought each year — about 7500 in federal courts and about 5000 in state courts.²⁰³

Figure 1: Class Action Filings



Although filing rates in Israel are high, most filings have been consumer (broadly defined to include banking and insurance) class actions, which account for seventy-eight percent of the total number of filings. Another sixteen percent of the cases were filed against government and public authorities for restitution of unlawful payments. All other causes of action, including securities, antitrust, antidiscrimination, employment, and environmental hazards, have generated a very small number of filings.²⁰⁴

This distribution of filings is starkly different from the United States, where statistical findings, published in 2000, showed that a variety of class actions had been filed, with a roughly similar filing volume for securities and antitrust, (twenty-nine percent), employment claims (nineteen percent) and consumer claims (twenty-five percent).²⁰⁵ A more recent study of federal class action settlements revealed the following breakdown for 2007: securities (thirty-

203 See Deborah L. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 308 n.7 (2011); Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1741-42 (2008).

204 Klement & Weinsall-Margel, *supra* note 139, at 86-89.

205 Distribution data from the United States is from DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS 53 (2000). The distribution includes an analysis of

five percent), labor and employment (fourteen percent), consumer (twelve percent), employment benefits (ten percent), civil rights (ten percent), debt collection (six percent), antitrust (four percent), commercial (two percent), and other (six percent).²⁰⁶ This wide variety of subject areas is in stark contrast to Israel, where most class actions involve consumer cases.

B. Class Action Outcomes

Most class actions in Israel are concluded before a court decision on the motion to certify. Of the cases that were resolved between 2006 and 2012, fifty-seven percent were concluded in voluntary dismissal and fifteen percent were concluded in settlement before certification. An additional six percent were resolved through a specific procedure allowing the government and public authorities to issue a cease and desist notice and avoid class certification.²⁰⁷ Thus, about eighty percent of the motions to certify were concluded through some type of consensual proceeding, and without any judicial examination of class certification requirements.

Only thirty percent of the resolved cases ended with some remedy for the class or for the public in general. Monetary compensation was awarded in only about ten percent of those cases. Other remedies included coupons and discounts, cy pres donations, injunctions and declaratory reliefs. Most monetary remedies (including coupons, discounts and cy pres donations) featured only a partial overlap between class members who were allegedly harmed and those who received the remedy.²⁰⁸ In terms of monetary value, the average value of direct monetary compensation (mostly in settlement) in Israel was less than one million dollars, and the compensation in coupon or cy pres settlements was even lower.²⁰⁹

For the United States, statistics about class action outcomes are surprisingly sparse and outdated. A 2012 study of removed federal question cases found that, in nearly 70% of the cases, no contested motion for certification was ever filed.²¹⁰ In the remaining 30.8% of cases in which a motion to certify was filed,

all 1020 judicial decisions in class actions reported in the years 1995-1996 in federal and state courts.

206 Fitzpatrick, *supra* note 105, at 818-20.

207 See Klement & Weinshall-Margel, *supra* note 139, at 91-92.

208 *Id.* at 94-97.

209 *Id.* at 94-95.

210 See Thomas E. Willging & Emery Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases 2009-2013*, 80 U. CIN. L. REV. 315, 319-20 (2012).

certification was granted in only one quarter (25.8%) of them. Thus, out of the total sample, only about 8% of putative classes ever received certification.²¹¹

A common criticism of U.S. class actions is that they serve to enrich class counsel but rarely provide a tangible benefit to class members.²¹² In a study of a representative sample of class actions from 2009-2013, the authors found that no cases ended in a final judgment on the merits, and only about one third of the cases resulted in class-wide relief through settlement,²¹³ which was below the national average for individual federal cases.²¹⁴ Moreover, because information regarding distribution of class relief is rarely available, it can be difficult to determine whether class members ever actually *received* the benefits they were awarded.²¹⁵

As noted above,²¹⁶ U.S. class action cases involve a wide diversity of subject areas. Moreover, settlement amounts can be enormous. For instance, one study of U.S. federal court class settlements in 2006 and 2007 found that the average settlement was close to \$55,000,000 (about NIS 220,000,000), while the median settlement was \$51,000,000 (about NIS 204,000,000).²¹⁷

A study by one private law firm (Carlton Fields), based on interviews with senior officials at 381 large corporations, shows that U.S. corporations spend billions of dollars each year defending class actions.²¹⁸ That study revealed that the highest percentages of cases involved consumer fraud and labor/

211 *Id.* at 320 (noting that the remaining cases were not necessarily denied certification but may have been withdrawn by plaintiffs or settled pre-certification).

212 See Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions 2*, Executive Summary (2013), http://www.instituteforlegalreform.com/uploads/sites/1/Class_Action_Study.pdf (relying on a “neutrally-selected” pool of federal cases drawn from two commercial reporters, tracking the cases’ progress from filing in 2009, and reporting their statuses at the time of the article’s writing in 2013).

213 Willging & Lee III, *supra* note 210 (finding that thirty-three percent of resolved cases were settled on a class-wide basis; also noting that fourteen percent of cases in the sample were still unresolved at the time of publishing).

214 Brown, *supra* note 212, at 2 (“[S]ettlement rate is half the average for federal court litigation, meaning that a class member is far less likely to have even a chance of obtaining relief than the average party suing individually.”).

215 *Id.* at 7 (“The class members’ actual benefit from a settlement — if any — is almost never revealed.”).

216 See *supra* text accompanying note 5.

217 See Fitzpatrick, *supra* note 105, at 828 (showing average and median awards from the study period and breaking them up by case type).

218 See THE 2016 CARLTON FIELDS CLASS ACTION SURVEY: BEST PRACTICES IN REDUCING COST AND MANAGING RISK IN CLASS ACTION LITIGATION 3 (2016), <http://classactionsurvey.com/pdf/2016-class-action-survey.pdf>.

employment (24.6% and 25%, respectively). Other prominent areas (with 7% or more) are product liability, antitrust, securities, and insurance. An area that has grown significantly in recent years is data privacy (4.8% in the survey). The percentage of U.S. companies that faced “high risk” class actions in 2015 was 50%, up from 37.1% in 2014. And 68.5% of U.S. companies had at least one open class action lawsuit against them in 2015. Another study, which focused solely on securities class actions, found that 234 securities class actions were filed in 2015, the highest level since 2008.²¹⁹

C. Cy Pres Awards

Cy pres was the most common remedy awarded in Israeli class actions that were resolved between 2006 and 2012 (including settlements, voluntary dismissals, and final verdicts). The average sum of donation in seventy-six cases (out of ninety-six) where the entire fund was distributed as cy pres was less than \$100,000 (about NIS 400,000). No apparent proximity could be identified between the interest of the recipients and those being pursued by class members, as eighty-five percent of the donations were channeled to nonprofit institutions devoted to assisting the infirm, the poor, or children.²²⁰

In the United States, recent decades have featured a steady increase in the approval of cy pres settlements in federal courts.²²¹ In the period 1974-2000, federal courts approved an average of one cy pres settlement per year; from 2001 to 2008, federal courts granted an average of eight cy pres awards per year.²²² Cy pres amounts are also not insignificant; in a study of forty-seven cy pres awards, authors found the average award to be \$5,800,000 (about NIS 23,000,000) and noted awards of up to \$75,700,000 (about NIS 303,000,000).²²³ The average cy pres award comprised 30.8% of the total compensatory damages awarded. Since 2000, “the majority of class action cy pres awards are associated with cases that were certified solely for the purposes of settlement.”²²⁴ Although no empirical studies exist beyond 2008, there can be no doubt that cy pres remedies have become increasingly common.

219 SVETLANA STARYKH & SEFAN BOETRICH, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2015 FULL-YEAR REVIEW 2 (2016), http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf.

220 See Klement & Weinshall-Margel, *supra* note 139, at 91-92.

221 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).

222 *Id.*

223 *Id.* at 658.

224 *Id.* at 661.

That fact is evidenced by the numerous court decisions in the last five years addressing the propriety of *cy pres* awards.²²⁵

D. Representatives' Compensation

An examination of class representatives' and attorneys' remuneration in Israel shows that their absolute amount as well as their percentage of the common fund was highest in cases resolved in settlement prior to class action certification. The median class attorney fee in pre-certification settlements was twenty percent, and the median compensation of class representatives was six percent, with average amounts of about NIS 190,000 (about \$47,500) and NIS 60,000 (about \$15,000), respectively.²²⁶ The respective percentages and absolute amounts in post-certification settlements or court decisions on the merits were lower.²²⁷ These findings suggest possible inconsistency between representatives' investment in the case and their subsequent payoff. Such inconsistency might have encouraged early settlements, thus failing to overcome the agency problem, which is inherent in class actions.²²⁸

Class attorneys and class representatives were also remunerated in cases that were resolved by voluntary dismissals. Although the median compensation was small (NIS 25,000 (about \$6250) for attorney fee and NIS 5000 (about \$1250) for representative compensation),²²⁹ some courts have criticized it for encouraging what they perceived as "nuisance litigation."²³⁰

225 See generally *In re Citigroup Inc. Sec. Litig.*, 07-CV-9901 (SHS), 2016 WL 4198194, at *3 (S.D.N.Y. Aug. 9, 2016); *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Perkins v. LinkedIn Corp.*, 2016 WL 613255 (N.D. Cal. Feb. 16, 2016), *appeal dismissed* (2d Cir. Aug. 16, 2016); *In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d 985 (N.D. Ohio 2016); *Keepseagle v. Vilsack*, 118 F. Supp. 3d 98 (D.D.C. 2015).

226 See Klement & Weinshall-Margel, *supra* note 139, at 97-100.

227 It should be noted, however, that the post-certification figures rely on a very small number of cases, since most cases are settled or dismissed before certification.

228 See Klement & Weinshall-Margel, *supra* note 139, at 97.

229 *Id.* at 99.

230 In a notable decision handed down by the Tel Aviv District Court judge Itzhak Inbar, no fee or compensation should be awarded in class actions that are voluntarily dismissed without any monetary remedy. See CA (TA) 39176-07-13 Levy v. Pasta Nona (Nov. 26, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.). This decision became highly controversial among district court judges. A subsequent, similar decision by the same judge was appealed and is currently awaiting decision by the Supreme Court. See CC (TA) 17923-10-13 Cohen v.

Notably, class representatives were ordered to pay the defendants' expenses in only about 16.6% of the cases in which no remedy was awarded. The amount of costs awarded was very small, with a median of NIS 15,000 (about \$3,750) and an average of about NIS 40,000 (about \$10,000).²³¹

With respect to incentive payments in U.S. class actions, a study of 374 federal court opinions handed down between 1993 and 2002 found that class representatives received incentive payments in about 27.8% of class actions that settled.²³² Median awards ranged from \$1000 (about NIS 4000) in consumer credit cases to \$31,000 (about NIS 124,000) in employment discrimination cases.²³³

With respect to attorneys' fees in U.S. class actions, in a study of class action settlements reported between 2009 and 2013, the authors found an "amazingly regular relationship" between the size of the class recovery and the percentage of that recovery awarded as attorneys' fees.²³⁴ For example, in cases with awards below \$100,000,000 (about NIS 400,000,000), the average recovery in 2013 was \$9,000,000 (about NIS 36,000,000) and the average attorney fee was \$2,100,000 (about NIS 8,400,000) — or about twenty-three percent.²³⁵ In cases with recoveries over \$100,000,000 (about NIS 400,000,000) the average recovery was \$976,000,000 (about NIS 3,904,000,000) and the average attorney fee was \$124,000,000 (about NIS 496,000,000) — just below eight percent.²³⁶ The methods of apportionment used by courts to calculate attorneys' fees also varied during the period of the study, with 6.29% of courts employing the lodestar method, 53.61% of courts using the percentage-of-recovery method, 38.23% using both, and the remainder (1.86%) relying on judicial discretion.²³⁷ The study found that in seventy-eight percent of cases in the period, the attorneys' fee granted was the precise amount requested by class counsel.²³⁸

Vita Pri Ha'galil Ltd. (Jan. 30, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

231 See Klement & Weinshall-Margel, *supra* note 139, at 100.

232 Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1322 (2006).

233 *Id.* at 1333.

234 Theodore Eisenberg et al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 940 (2017) ("[K]ey determinant of the fee continues to be the size of the class recovery[;] . . . fees as a percentage of the recovery decrease as the size of the recovery increases.").

235 *Id.* at 943.

236 *Id.*

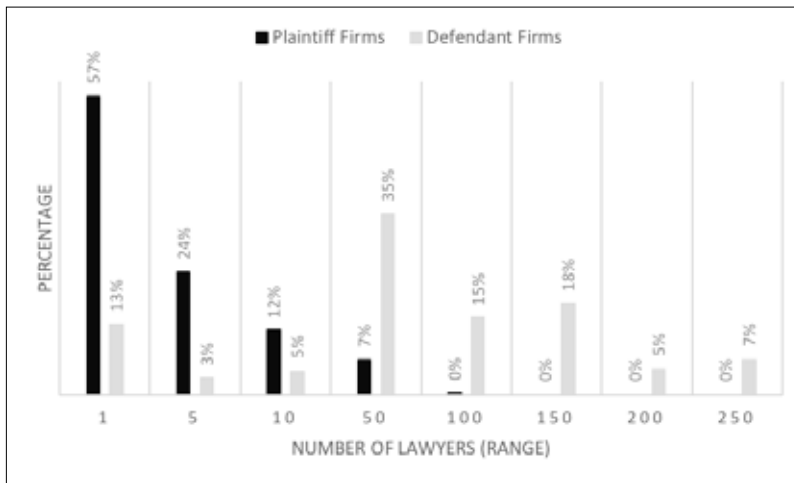
237 *Id.* at 945.

238 *Id.* at 953.

E. The Class Action Bar

In Israel, plaintiff law firms are very small. Many of them are sole practitioners, and others almost never exceed ten lawyers. This stands in contrast to defendant law firms, which in many cases were among the top Israeli firms, employing between 50 and 250 lawyers. The following figure describes the distribution of plaintiff and defendant firms in class actions, according to the number of lawyers, between 2006 and 2012.

Figure 2: Attorney Firm Size



By contrast, the class action bar in the United States is strikingly different. Although in the 1980s, Professor John Coffee wrote about a U.S. plaintiffs' bar that consisted primarily of small firms,²³⁹ that situation has changed dramatically. As Professor Morris Ratner wrote in 2012, "larger firms have in fact come to dominate the plaintiffs' class action bar."²⁴⁰ He noted, for example, that "a few large plaintiffs' firms are present in most securities class action lawsuits."²⁴¹ He pointed out that the same phenomenon exists in the

239 See, e.g., John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 706-11 (1986).

240 Morris A. Ratner, *A New Model of Plaintiffs' Class Action Attorneys*, 31 REV. LITIG. 774 (2012).

241 *Id.* at 774.

employment and antitrust contexts.²⁴² A few examples demonstrate the size of some of the leading plaintiff class action firms:

- Robbins Geller Rudman & Dowd has approximately two hundred lawyers, who focus heavily on securities fraud class actions.²⁴³
- Weitz & Luxenberg has more than eighty-five lawyers in three offices. It specializes in mass tort cases.²⁴⁴
- Hagens Berman has approximately seventy attorneys in ten offices. It represents plaintiffs in a variety of class actions involving consumer, employment, and environmental cases.²⁴⁵
- Lieff Cabraser Heimann & Bernstein has approximately sixty lawyers, and has offices in San Francisco, New York, Nashville, and Seattle. It only represents plaintiffs, and it has a substantial plaintiff class action practice, focusing on employment, consumer, toxic torts, securities fraud, and antitrust cases.²⁴⁶

These firms (and others like them) have achieved recoveries for class members in the billions of dollars.²⁴⁷ Moreover, as Professor Ratner has noted, in large multidistrict litigation (MDL) matters, “judges gravitate toward established, big plaintiffs’ firms.”²⁴⁸

Ratner notes that smaller firms do, however, participate in class actions in three ways: (1) smaller firms with “big aspirations” frequently “join[] forces with other plaintiffs’ firms”; (2) small firms sometimes file “copycat”

242 *Id.* at 776-77.

243 THE RIGHT CHOICE, ROBINS GELLER RUDMAN & DOWD LLP, <http://www.rgrdlaw.com/firm.html> (last visited Aug. 13, 2017).

244 *About Us*, WEITZ & LUXENBERG, <http://www.weitzlux.com/about-us/> (last modified July 18, 2017).

245 *About*, HAGENS BERMAN, <https://www.hbsslaw.com/about-us> (last visited Aug. 13, 2017).

246 *About Us: Our Passion for Justice*, LIEFF CABRASER HEIMANN & BERNSTEIN, <http://www.lieffcabraser.com/about-us/> (last visited Aug. 13, 2017).

247 *See In re Enron Corp. Sec. Litig.*, 586 F. Supp. 2d 732, 789 (S.D. Tex. 2008) (Robbins Geller Rudman & Dowd represented investors as lead counsel, successfully obtaining settlements in excess of 7.2 billion dollars); Tobacco Master Settlement Agreement, (1998) (Hagens Berman represented thirteen states in a 206-billion-dollar settlement); *Kline v. The Progressive Corp.*, Circuit No.: 02-L-6 (Circuit Court of the first Judicial Circuit, Johnson County, Illinois) (Lieff Cabraser served as lead counsel in a 450-million-dollar settlement for both monetary and equitable relief); *Allen et al. v. Takeda Pharmaceutical Co.*, # 6:12-cv-00064 (jury verdict for nine billion dollars won by Weitz & Luxenberg against pharmaceuticals for cancer risks associated with Actos).

248 Ratner, *supra* note 240, at 777-78.

complaints”); and (3) small firms sometimes intervene for specific reasons (for example, firms that repeatedly object to class settlements).²⁴⁹ Such firms, however, tend not to bring the major cases in the first instance and tend not to be selected for key posts in major MDL cases.

IV. EXPLAINING THE SIMILARITIES AND DIFFERENCES BETWEEN ISRAELI AND U.S. CLASS ACTION PRACTICE

As compared to the United States, Israeli class actions feature three significant characteristics. First, the number of filings is higher than the respective number in the United States, if considered on a per-capita basis. Second, the size of remedies awarded, and consequently of attorneys’ fees, is significantly lower in Israel. Third, in terms of subject matter, U.S. class actions are much more diversified. In the U.S. securities, employment and consumer class actions each roughly account for a quarter of the total federal class action caseload. In comparison, in Israel, consumer class actions comprise about three quarters of the total number of class action filings.

Like any comparative project, ours also faces the very difficult task of appreciating what accounts for the similarities between the two legal regimes, and what explains the differences between them. When a small country like Israel transplants an almost identical mass litigation procedure from the much larger United States, one question that may be asked is whether the structural mechanisms that are built into the U.S. procedure produce similar results, or whether the differences between the two countries in general, and the class action regimes in particular, will affect the outcomes. Based on the comparison between the two regimes, we next provide possible conjectures regarding the similarities and differences between them.

A. Explaining the Large Number of Class Actions in Israel

The large number of class actions filed in Israel is itself noteworthy. As noted above, few countries outside the United States have *any* significant class action activity. Israel, by contrast, has more activity, on a sheer numbers basis, than the United States. The reason, we believe, is that Israel has adopted essential features of the U.S. infrastructure that encourage the filing of class actions. Indeed, on some points, the Israeli system is even more flexible and conducive to class actions than the U.S. procedures.

249 *Id.* at 779-80.

First, both countries have opt-out procedures that guarantee that most class members will be bound (and thus any settlement or judgment will bring global peace for defendants), without requiring any action on their part. In view of the rational indifference of represented class members, whose costs of either opting in or opting out of the class action often far exceed the value of their individual claims, the opt-out default turns out to be crucial to enabling a viable and effective class action regime. By contrast, most countries outside the United States bar opt-out class actions and require that, to be bound, individual claimants must affirmatively opt into the class. This, by and large, renders class actions ineffective.²⁵⁰

Second, Israel has adopted the essential U.S. framework for paying class counsel — either the percentage or lodestar method, with a preference for the percentage method. Again, in most other countries, contingent arrangements that award attorneys based on a percentage of the recovery are not allowed.²⁵¹ Hence, unlike other countries, Israel and the United States allow entrepreneurial lawyers to look for relevant causes of action, file them, and litigate them to settlement or judgment.

Third, the Israeli class certification framework is very similar to that in the United States, focusing on overarching common issues, fairness and efficiency (or in U.S. terminology, superiority), and adequacy of representation. Although Israel authorizes public agency representatives, class actions are mainly prosecuted by private claimant representatives.²⁵² Indeed, Israel provides an even stronger incentive for private enforcement because the incentive

250 Klonoff, *supra* note 2, at 2.

251 *Id.* at 4-5; *see also* John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288 (2010) (discussing Europe's embrace of third-party funding, in lieu of contingent fees, as a means of funding class actions); W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the "Odd Man Out" in How It Pays Its Lawyers?*, 16 ARIZ. J. INT'L & COMP. L. 361, 381 (1999) (describing a "deeply ingrained attitude of hostility toward the contingent fee," which "has made contingent fees illegal, unethical, or both in virtually all countries outside the U.S.") (citations omitted); Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 DUKE J. COMP. & INT'L L. 125, 128 (2003) ("In nearly all the rest of the world, prevailing practices and attitudes hew in varying degrees to an opposite paradigm in which losers in civil litigation are usually liable for a substantial portion of winners' reasonable attorney fees . . .").

252 In many countries, only public entities can bring class actions. *See, e.g.*, Ilana T. Buschkin, *The Viability of Class Action Lawsuits in A Globalized Economy — Permitting Foreign Claimants to Be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1578 (2005) (explaining

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 Rule 23(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

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.