

# GLOBAL LITIGATION TRENDS

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## I. INTRODUCTION

The United States civil litigation system, and American litigators in particular, have been “the objects of a strange combination of derision

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and fascination with most members of the foreign legal profession.”<sup>1</sup> The “American system” is often viewed as anticompetitive and too entrepreneurial.<sup>2</sup> It is also quite different from the civil systems of other countries. Some aspects of the American system that have been called “exceptional” because of their traditional uniqueness include:

[C]lass actions, primarily on an opt-out basis; contingency-fee financing of litigation; rejection of Euro-style “loser-pays” rules that link responsibility for the fees of both sides to the outcome of the litigation; extensive reliance on juries as fact-finders; costly pre-trial discovery; and the availability of punitive damages in substantial areas of civil litigation, such as torts.<sup>3</sup>

Recent reforms adopted or under serious consideration around the globe may make the American civil system a little less unique, particularly in the area of aggregative litigation, litigation funding, and punitive damages.<sup>4</sup> This Article will explore these developments. The Article concludes that, while wholesale changes outside the United

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1. Sabine Chalmers, *US Style Litigation in Europe?*, 26 No. 3 ACC Docket 16 (Apr. 2008).

2. See, e.g., John Duckers, *Beware ‘Compensation Culture’*, BIRMINGHAM POST, Jan. 18, 2008, at 22, available at 2008 WLNR 1004344; Anne Marie Borrego, *An Unwelcome American Export*, AMERICAN LAWYER, Winter 2008, at S15; see also Steven B. Hantler et al., *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121 (2005); Alfred W. Cortese, Jr. & Kathleen L. Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at our Own Game?*, 9 J.L. & COM. 167 (1989).

3. Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 2 (2009); see also Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179 (2009); Chalmers, *supra* note 1; Yves Heijmans, *Class Actions in Belgium and Europe*, 24 No. 3 ACC DOCKET 117, 118 (Mar. 2006):

First, only a handful of EU countries recognize punitive or exemplary damages, and these are rarely awarded. Second, contingency fees for lawyers, where payment is only due if the proceedings are successful, are still not allowed in many EU countries. Finally, with the exception of the common law jurisdictions (the United Kingdom (excluding Scotland), Ireland, and Cyprus), there are no broad discovery procedures allowing for the production of all documents that are material to the issues and proceedings. In order for documents to be disclosed, plaintiffs must identify (more or less precisely, depending on the jurisdiction) the individual documents they wish to be disclosed. In addition, plaintiffs have limited powers to obtain adverse testimony from the defendant or third parties through cross-examination.

4. See Nagareda, *supra* note 3, at 3; see also Lisa Rickard, *A Gift from America to Europe: Class Action Lawyers and their Costly Lawsuits*, INST. LEGAL REFORM, Feb. 29, 2008, [http://www.instituteforlegalreform.com/about/presidentscorner\\_20080219.cfm](http://www.instituteforlegalreform.com/about/presidentscorner_20080219.cfm); Linda Willett & Malcolm Carlisle, *Pro-Plaintiff Changes: Gathering Clouds in Europe’s Courtrooms*, 48 No. 5 FOR THE DEF. 74 (2006).

States are not necessarily imminent, companies doing business abroad must pay attention to the rapidly emerging global trends and become engaged in the dialogue that is occurring.

## II. DEVELOPMENTS IN AGGREGATIVE LITIGATION

Aggregative litigation is the area where perhaps the most significant and widespread legal changes are occurring around the globe. From the mid-1960s until about ten years ago, only the United States and a few other countries had class action procedures.<sup>5</sup> More recently, the number of countries with class action or other aggregative litigation procedures has mushroomed. Many countries, including most European and several South American nations, now recognize some form of multiclient

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5. These countries included:

**Australia**, see Vince Morabito, *Australia*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 320 (Mar. 2009) (class actions may be brought in the Federal Court of Australia and the Supreme Court of Victoria); S. Stuart Clark, *Thinking Locally, Suing Globally: The International Frontiers of Mass Tort Litigation in Australia*, 74 DEF. COUNS. J. 139 (2007); Bernard Murphy & Camille Cameron, *Access to Justice and the Evolution of Class Action Litigation in Australia*, 30 MELB. U. L. REV. 399 (2006); S. Stuart Clark & Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 289 (2001).

**Brazil**, see Luiz Migliora et al., *Trial and Error: Class Actions in Brazil and the US, and Global Trends*, LATIN LAWYER, Sept. 2007, at 38; Ada Pelligrini Grinover, *Brazil*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 63 (Mar. 2009).

**Canada**, see Todd J. Burke, *Canadian Class Actions and Federal Judgments*, BUS. L. TODAY, Sep./Oct. 2007, available at 17-OCT Bus. L. Today 49 (Westlaw) (stating that a majority of Canada's thirteen provinces have laws providing for the initiation of class proceedings, and Canada's Supreme Court "has sanctioned the class action approach in those jurisdictions where comprehensive class action legislation is not found"); Jasminka Kalajdzic et al., *Canada*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 41 (Mar. 2009); see also John Beisner et al., *Canadian Class Action Law: A Flawed Model for European Class Actions*, ENGAGE, June 2008, at 125; Garry D. Watson, *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269 (2001).

**Chile**, see Martín Gubbins & Carla López, *Chile*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 68 (Mar. 2009).

**China**, see Michael Palmer & Chao Xi, *China*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 270 (Mar. 2009); Note, *Class Action Litigation in China*, 111 HARV. L. REV. 1523 (1998).

**India**, see Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COM. L. 751, 819–20 (2003) (noting that representative suits in India have been deemed to be the "functional equivalents of class actions since their outcomes are also 'binding on all persons on whose behalf, or for whose benefit, the suit is instituted'").

**South Africa**, see Clive Plasket, *South Africa*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 256 (Mar. 2009).

litigation—whether class actions, group actions, or representative actions by consumer or public organizations.<sup>6</sup> The trend reflects the increasingly global nature of commerce, the spread of information through the Internet, changing cultural attitudes in many countries that place a “growing emphasis on the protection of consumer interests,”<sup>7</sup> the influence of the U.S. and U.K. legal systems on other countries,<sup>8</sup> and efforts by the personal injury bar in the United States<sup>9</sup> to expand business abroad and engage in global “forum shopping” to avoid class action reforms adopted in the United States (such as the federal Class Action Fairness Act of 2005 (CAFA)).<sup>10</sup> The result has been a “modest lessening of American exceptionalism” in aggregative litigation throughout the globe.<sup>11</sup>

Foreign aggregative litigation procedures vary widely but generally seek to permit mass resolution of claims<sup>12</sup> while trying to avoid U.S.-

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6. See Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 13 (Mar. 2009); Laurel J. Harbour & Marc E. Shelley, *The Emerging European Class Action: Expanding Multi-Party Litigation to a Shrinking World*, 18 No. 4 PRAC. LITIGATOR 23, 24 (July 2007); Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 10 MICH. ST. J. INT’L L. 205, 224 (2001) (“Many nations now permit ‘group actions’ which allow multiple claimants to aggregate their causes of action and which enable them to pursue those claims in a single forum.”).

7. Rod Freeman, *How the Class Action Pendulum Swings in Europe*, 47 No. 3 FOR THE DEF. 67 (Mar. 2005); see also Reimann, *supra* note 5, at 756–60; LLOYD’S, DIRECTORS IN THE DOCK: IS BUSINESS FACING A LIABILITY CRISIS? 4 (May 2008) (“There is widespread agreement among business leaders that a US-style compensation culture is spreading, especially within Europe.”).

8. See generally Nicholas M. Pace, *Group and Aggregate Litigation in the United States*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 32 (Mar. 2009).

9. See Laurel J. Harbour, *Trial Lawyers Go Transatlantic*, LITIG. MGMT., Summer 2003, at 10.

10. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d) and other sections of Title 28); see also Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.). In addition, Rule 23 of the Federal Rules of Civil Procedure, which governs class action procedures in U.S. federal courts, has been amended in recent years. A 1998 amendment provided for interlocutory appeals of class certification decisions at the discretion of the Court of Appeals. See Fed. R. Civ. P. 23(f). The 2003 amendments tightened the process for approving class settlements, see Fed. R. Civ. P. 23(e), and added new sections to address appointment of class counsel, see Fed. R. Civ. P. 23(g), and awards of attorneys’ fees, see Fed. R. Civ. P. 23(h).

11. Nagareda, *supra* note 3, at 47.

12. See Louis Degos & Geoffrey V. Morson, *The Reforms in Class Action Laws in Europe Are as Varied as the Nations Themselves*, 29 L.A. LAW. 32 (2006); Edward F.

style entrepreneurial litigation and the types of abuses that led to CAFA's enactment.<sup>13</sup> As one London defense lawyer explained, "it is clear that care will be taken to ensure that the scales do not tip so far as to create a disproportionate balance between the rights of consumers and the ability of businesses to function effectively and without fear of spurious claims being brought against them."<sup>14</sup> Likewise, European Commissioner for Competition Neelie Kroes has said that "the single biggest challenge" for the Commission is getting the balance between private competition enforcement and litigation "precisely right, so that private actions are effectively facilitated without incentivizing unmeritorious litigation."<sup>15</sup> Marc Tüngler, a managing director of DSW, Germany's best-known shareholder-protection group, recently said that he supports a European class action law, but opposes the American model, explaining, "We don't want a litigation industry."<sup>16</sup>

Whether countries will be successful in their efforts to take the "good" and not the "bad" from the U.S. experience remains to be seen. Perhaps tellingly, a 2007 survey of 240 European business executives and lawyers by the Intelligence Unit of *The Economist* reported a widespread expectation that aggregative litigation will become "prevalent" in Europe over the next decade.<sup>17</sup> The survey found that "[n]early 59 percent of respondents expect consumer goods companies to be targeted . . . followed by the pharmaceuticals (50 percent) and financial services (42 percent) industries."<sup>18</sup> Another recent survey of

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Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 F.R.D. 130 (2003); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401 (2002).

13. For a discussion of problems in United States class action litigation, see Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call For Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483 (2000); Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215 (2001); John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 HARV. J.L. & PUB. POL'Y 143 (2001).

14. Matthew Shankland, *US Firms in London: Balancing the Redress*, LAW., Apr. 7, 2008, available at 2008 WLNR 6545032.

15. *Making Waves: Interview with EU Commissioner For Competition Neelie Kroes*, ANTITRUST, Spring 2008, at 47, 49.

16. Editorial, *Bad Connection*, THE ECONOMIST, Apr. 10, 2008.

17. Nagareda, *supra* note 3, at 4-5; Michael Goldhaber, *Mass Action in the U.K.*, 29 AM. LAW. S27 (Winter 2008).

18. Steven T. Taylor, *Corporate Europe Braces for Class-Action Litigation as Prudent US Firms Get Ready*, 27 No. 3 OF COUNS. 1, 17 (Mar. 2008).

UK directors by the law firm Eversheds “revealed that certain sectors are particularly concerned about class actions with nearly 80 percent of business in the manufacturing sector, 72 percent in travel and transport, and 70 percent in IT believing class actions would have a particularly negative impact.”<sup>19</sup>

Recently, the National Association of Pension Funds (a British organization) “stepped up its advocacy of British consumers to consider class-action claims, and the UK’s Office of Fair Trading embraced a number of facets of the US class-action system.”<sup>20</sup> Moreover, the prominent U.S. class action firm of Cohen, Milstein, Hausfeld & Toll recently established a London office, suggesting that the firm sees an entrepreneurial opportunity ahead.<sup>21</sup> SimmonsCooper, the southern Illinois plaintiffs’ firm best known for its asbestos litigation work, “launched its first overseas outpost in 2007 when it affiliated with a London litigation shop to form SimmonsCooper Andrews”; SimmonsCooper is also venturing into Africa, merging with a Nigerian firm that is “working on multibillion-dollar suits against pharmaceutical and tobacco companies.”<sup>22</sup>

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19. Duckers, *supra* note 2, at 22; see also NAT’L UNDERWRITER—PROP. & CAS. INS., REPORT: U.S. LITIGATION EXPLOSION COULD BE IN STORE FOR EUROPE (Sept. 9, 2008), available at 2008 WLNR 17155934 (quoting George Carrington, managing director of the London office of Guy Carpenter & Co., LLC, which deals with international casualty insurance developments):

The changing claims environment in Europe and the movement toward American-style litigation are trends that merit close attention. Although the extent to which the industry will have to deal with frivolous claims in Europe is still uncertain, it is safe to say that insurers increasingly will be obliged to defend claims, which will likely result in higher legal defense costs.

20. Taylor, *supra* note 18, at 17; see also Chris Bates & Malcolm Sweeting, *The Creep of Class Actions Into Europe Clifford Chance Client Briefing, May 2007*, in SEVENTH ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE: A CONTRAST IN EU & US PROVISIONS 569, 569. (2008).

21. See Julia Werdigier, *Europe Braces for Wave of U.S.-Style Class Action*, INT’L HERALD TRIB., Oct. 31, 2007, at 16; Alexia Garamfalvi, *Firms Prepare for European Class Actions*, LEGAL TIMES, June 8, 2007. Michael Hausfeld, a named partner in the Cohen Milstein law firm recently told the *New York Times* that while the firm itself is not lobbying for legal changes to make it easier to sue in foreign courts, “we are involved with others who are doing that.” Jonathan D. Glater, *To The Trenches: The Tort War is Raging On*, N.Y. TIMES, June 22, 2008, at 1.

22. Richard Lloyd, *Into Africa: Simmons Cooper’s Novel International Expansion*, 30 AM. LAW. 24 (Mar. 2008); Christina Le Beau, *The Big, Big World of Law: What Does It Take to Go Global?*, 29 CRAIN’S CHI. BUS. 34 (Sep. 18, 2006), available at 2006 WLNR 16480789. In addition, SimmonsCooper has reportedly reached an agreement in principle to represent the Intellectual Property Cell of the Indian Institute of Science (IISc), a research university, to

The fact that the United States did not intend the consequences of its class action rule is one point often overlooked in the discussion in other countries of how to avoid a U.S.-style litigation culture.<sup>23</sup> The 1966 revisions to Rule 23 of the Federal Rules of Civil Procedure were arguably designed to clarify the confusion of applying previously abstract class action categories under the prior 1938 rule.<sup>24</sup> The truly objectionable examples of class action abuse that other countries are so deliberate to avoid, however, have occurred since this supposed improvement. Indeed, nearly thirty years passed between the first codification of Rule 23 and its modification to cure the trouble it brought, and after 1966, there were over thirty years of additional difficult experimentation before the adoption of an interlocutory appeal of certification in 1998.<sup>25</sup> Even then, the federal CAFA law was still seen as a necessary patch, and one could argue that opportunities for abuse still persist. The amendments and clarifications of Rule 23 have at times created a causal fallacy among the foreign audience that a simpler model would avoid the United States' woes. Basic is not always better. When one examines the decades of debate in the United States, one can see how, over time, a model's ambiguity can create opportunities to expand down a slippery slope. Indeed some countries that already permit consumer associations to seek injunctive relief—e.g., Brazil—are the same countries first on the list arguing that new reforms are needed.

Companies that do business in countries that have adopted or may adopt aggregative litigation procedures need to be engaged in the dialogue as these laws are being considered and thereafter when they are being implemented in the courts. As one in-house attorney for a major international company wisely cautioned: "There is a big difference between what is proposed at the beginning of a debate and what comes out in the ensuing debate."<sup>26</sup> He added, "You shouldn't take the

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prosecute patents for the IISc around the world and bring patent infringement actions on behalf of IISc. See Paul Braverman, *A Passage to India: A Madison County, Illinois, Plaintiff's Attorney Sees Opportunity in Helping Indian Universities Milk Their Patent Portfolios*, 28 AMERICAN LAWYER S146 (Nov. 2006).

23. For a discussion on the fear of the spread of the U.S. litigation culture, see Borrego, *supra* note 2.

24. See Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 715 (Spring 2003); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 380–86 (1967).

25. See Fed. R. Civ. P. 23(f).

26. Lex Mundi, *Europe Braces for Class and Group Actions*, INSIDE COUNSEL, Dec.

declaration that those in Europe do not want to replicate the U.S. system at face value. I'm sure that's the intention, but changes can take things very far from their original intent."<sup>27</sup> Another commentator has said that, while the impact of the current collective litigation procedures outside the United States should not be overstated, "there are certainly good reasons to be concerned that such reforms, if not accompanied by proper controls, may ultimately prove to be a serious burden on business, particularly if they are utilized by interests driven by an increasing awareness of consumer rights, and a more determined belief in the need for greater corporate responsibility."<sup>28</sup>

A summary of recently adopted key foreign enactments is set forth below, listed in alphabetical order by country. Other countries are considering proposals to either expand current law (e.g., Argentina<sup>29</sup> and Brazil<sup>30</sup>) or to adopt some form of aggregative litigation system (e.g., France,<sup>31</sup> Mexico,<sup>32</sup> and Poland<sup>33</sup>). Not all countries, however, are jumping on the bandwagon. For instance, in countries such as Japan,<sup>34</sup> Austria,<sup>35</sup> Belgium,<sup>36</sup> and Switzerland,<sup>37</sup> suggestions to examine the

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2007, at 63 (quoting Michael Reardon, a senior lawyer at Altria Corporate Services International Inc. in Lausanne, Switzerland).

27. *Id.*

28. Freeman, *supra* note 7, at 67.

29. See Héctor A. Mairal, *Argentina*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 54 (Mar. 2009) (discussing proposal by Argentine Representative Juan Manuel Urtubey, 33 TRÁMITE PARLAMENTARIO 19/4/07).

30. See Migliora, *supra* note 5, at 38.

31. See Véronique Magnier, *France*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 114 (Mar. 2009).

32. See Ricardo Ríos Ferrer & David Guillén-Llarena, Collective Actions Proposal, presented at the National Consultation on Integral and Coherent Reform of the Justice System, issued by the Supreme Court of Mexico, Mar. 30, 2004 (on file with author & Mich. St. J. Int'l L.); Alberto Benitez, Proposals on Collective Actions in Consumer Law, presented during the seminar, Access to Justice to Consumers in Mexico Through Collective Actions, Mexico City, Nov. 15–16, 2007 (on file with author & Mich. St. J. Int'l L.). For a general overview of Mexican civil law, see Jorge A. Vargas, *Mexican Law and Personal Injury Cases: An Increasingly Prominent Area for U.S. Legal Practitioners and Judges*, 8 SAN DIEGO INT'L L.J. 475 (2007).

33. See Magdalena Tulibacka, *Poland*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 190 (Mar. 2009).

34. See Ikuo Sugawara, *Japan*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 280 (Mar. 2009). For a general overview of Japan's product liability law, see Mark A. Behrens & Daniel H. Raddock, *Japan's New Product Liability Law: The Citadel of Strict Liability Falls, But Access to Recovery Is Limited by Formidable Barriers*, 16 U. PA. J. INT'L BUS. L. 669 (1996).

35. See Georg E. Kodek, *Collective Redress in Austria*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 86, 89 (Mar. 2009).

36. See Matthias E. Storme & Evelyn Terryn, *Belgium*, 622 ANNALS AM. ACAD. POL. &

possibility of introducing class action procedures have met with considerable opposition.

### III. SUMMARY OF RECENT ENACTMENTS

#### Argentina: Consumer Protection Law (2008)<sup>38</sup>

Grants standing to consumer associations to bring collective actions on behalf of consumers. <sup>39</sup>
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Opt-out procedure. <sup>40</sup>
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<i>Res judicata</i> effect is given to judgments favorable to plaintiffs when raised by other consumers or users who share similar circumstances. <sup>41</sup>
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#### Denmark: Administration of Justice Act (2008)<sup>42</sup>

Class actions can be brought when (1) there is a common claim, (2) there is a Danish venue for all of the claims, (3) the court is the venue for one of the claims, (4) the court possesses the requisite expertise to deal with the claims, (5) a class action is determined to be the best way to handle the claims, (6) the members of the class can be identified and informed of the case in an appropriate manner, and (7) a class representative can be appointed. <sup>43</sup>
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The requirement that the class action must be judged to be the best manner to handle the claims “is intended as a filter for unmeritorious and weak claims.” <sup>44</sup>
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Class actions are instituted by writ to the court containing (1) a description of the class, (2) information on how the class members can be identified and provided notice of the case, and (3) the name of the proposed class representative. <sup>45</sup>
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SOC. SCI. 95, 102 (Mar. 2009).

37. See Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW. J. INT’L L. & BUS. 301 (2007); Samuel P. Baumgartner, *Switzerland*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 179 (Mar. 2009).

38. See Mairal, *supra* note 29, at 58.

39. See *id.*

40. See *id.*

41. See *id.*

42. See Nagareda, *supra* note 3, at 20; Erik Werlauff, *Class Actions in Denmark*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 203 (Mar. 2009); Harbour & Shelley, *supra* note 6, at 30–31.

43. See Nagareda, *supra* note 3, at 19; Werlauff, *supra* note 42, at 203.

44. Werlauff, *supra* note 42, at 203.

45. See *id.* at 203–04.

Class representative is appointed by the court and may be an individual class member, public authority (e.g., Consumer Ombudsman), or private association. <sup>46</sup>
Judicial discretion to apply opt-in or opt-out procedure. <sup>47</sup>
Opt-out proceedings appropriate if claims too small to be likely to be brought individually. <sup>48</sup>
Only public bodies may serve as class representatives in opt-out proceedings. <sup>49</sup>
Class members may be required to provide security for legal costs. <sup>50</sup>
“Leading Danish lawyers with considerable litigation experience are already preparing to handle class action cases.” <sup>51</sup> A Danish lawyer has predicted that claims brought under the new law “will first and foremost be consumer claims organized by the Consumer Ombudsman,” such as claims involving allegedly defective goods. <sup>52</sup>

#### England and Wales: Group Litigation Order (1999)<sup>53</sup>

Courts can enter Group Litigation Orders (GLOs) to provide standardized, centralized management of cases that involve common or related issues of fact or law. <sup>54</sup>
Not representative litigation, but test cases and lead solicitors may be used. <sup>55</sup>
Initiated by parties (plaintiff or defendant) or court. <sup>56</sup>

46. See Nagareda, *supra* note 3, at 20; Werlauff, *supra* note 42, at 204.

47. See Nagareda, *supra* note 3, at 20; Werlauff, *supra* note 42, at 205; Harbour & Shelley, *supra* note 6, at 31.

48. See Nagareda, *supra* note 3, at 20; Werlauff, *supra* note 42, at 205.

49. See Nagareda, *supra* note 3, at 20.

50. See *id.*; Werlauff, *supra* note 42, at 206.

51. *Id.* at 208.

52. Lex Mundi, *supra* note 26, at 63 (quoting Jens Rostock Jensen of the Kromann Reumert law firm).

53. See Nagareda, *supra* note 3, at 20; Christopher Hodges, *England & Wales*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 105 (Mar. 2009); Harbour & Shelley, *supra* note 6, at 28–29; Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11 DUKE J. COMP. & INT’L L. 249 (2001). Scotland has not introduced a formal group litigation procedure. See Hodges, *supra*, at 105. Ireland allows test cases and representative actions. See Harbour & Shelley, *supra* note 6, at 31.

54. See Nagareda, *supra* note 3, at 20; Hodges, *supra* note 53, at 109; Gary Rubin, *Commentary, Collective Litigation in Europe: Policy Considerations From The U.S. Class Action Experience*, LEGAL BACKGROUND, Jan. 18, 2008, at 2, available at <http://www.wlf.org/upload/1-18-08rubin.pdf>.

55. See Nagareda, *supra* note 3, at 20; Hodges, *supra* note 53, at 109.

If initiated by a party, the application for a GLO should include (1) “[a] summary of the nature of the litigation,” (2) “[t]he number and nature of the claims already issued,” (3) “[t]he number of parties likely to be involved,” (4) “[t]he common issues of fact or law that are likely to arise in the litigation,” and (5) “[w]hether there are any matters that distinguish smaller groups of claims within the wider group.”<sup>57</sup>

No formal requirement for predominance of common issues.<sup>58</sup>

Opt-in procedure.<sup>59</sup>

So far, over fifty GLOs have been registered.<sup>60</sup>

Recently, the Civil Justice Council (CJC), a nondepartment public body that advises the Lord Chancellor on civil justice and civil procedure in England and Wales, published formal recommendations as to collective actions. The CJC’s lengthy report proposes the introduction of a generic collective action, capable of being brought by a wide range of representative parties, from individual representative claimants to designated or ad hoc bodies.<sup>61</sup> “The proposals do not call for the wholesale adoption of the much-feared American-style class action,” but “the CJC does propose that in some instances an opt-out procedure would be appropriate.”<sup>62</sup>

#### Finland: Group Action Act (2007)<sup>63</sup>

Applies only to consumer cases where the government-funded Consumer Ombudsman is acting as the lead counsel; securities class actions are excluded.<sup>64</sup>

56. See Nagareda, *supra* note 3, at 20; Harbour & Shelley, *supra* note 6, at 29.

57. Christopher Hodges, *Global Class Actions Project Country Report: England & Wales*, STANFORD LAW SCH. GLOBAL CLASS ACTIONS EXCH., at 13, [http://www.law.stanford.edu/display/images/dynamic/events\\_media/England\\_Legislation.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/England_Legislation.pdf) (last visited Feb. 21, 2009).

58. See *id.* at 17; Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. & INT’L L. 321, 346 (2001).

59. See Nagareda, *supra* note 3, at 20.

60. See Harbour & Shelley, *supra* note 6, at 29.

61. See Guy Pendell, *Another Step Towards Class Actions in England and Wales?*, MONDAQ BUS. BRIEFING, Sept. 5, 2008, available at 2008 WLNR 16838114 (describing the CJC’s recommendations).

62. *Id.*

63. See Klaus Viitanen, *Finland*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 209 (Mar. 2009); Mikko Välimäki, *Introducing Class Actions in Finland—An Example of Lawmaking Without Economic Analysis*, Jan. 2008, at 1, available at [http://www.valimaki.com/org/class\\_action.pdf](http://www.valimaki.com/org/class_action.pdf) (published in Finland as *Uusi Ryhmäkannelaki—Eräs Lainsäädäntöpoliittinen Seikkailu*, 105 LAKIMIES 3 (Jan. 2008)); Harbour & Shelley, *supra* note 6, at 31.

64. See Viitanen, *supra* note 63, at 210, 213; Välimäki, *supra* note 63, at 1; Harbour &

Opt-in procedure. <sup>65</sup>
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Germany: Capital Markets Model Case Act (2005)<sup>66</sup>

Origins can be traced to litigation brought by thousands of investors and over 750 lawyers against Deutsche Telekom alleging the company provided inflated financial information in two offering prospectuses in 1999 and 2000. <sup>67</sup>
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Applies to securities litigation claims. <sup>68</sup>
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Model proceedings are instituted with the filing of an application by a party demonstrating that the start of a model case procedure may have significance for other similar cases. <sup>69</sup>
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If at least ten similar applications are filed, the trial court refers the model case to the court of appeals to conduct the actual model case proceedings and render a judgment on the model question(s). <sup>70</sup>
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The court of appeals may stay related cases pending in other courts and issue a binding ruling. <sup>71</sup>
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Opt-in procedure. <sup>72</sup>
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After the model question(s) are decided by the court of appeals, the trial court decides the individual cases with regard to the model ruling. <sup>73</sup>
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Law is experimental and expires on November 1, 2010 unless extended. <sup>74</sup>
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Shelley, *supra* note 6, at 31.

65. See Viitanen, *supra* note 63, at 214; Välimäki, *supra* note 63, at 2; Harbour & Shelley, *supra* note 6, at 31.

66. Nagareda, *supra* note 3, at 21; Dietmar Baetge, *Germany*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 125, 127 (Mar. 2009); Harbour & Shelley, *supra* note 6, at 29.

67. See *Bad Connection*, *supra* note 15; Baetge, *supra* note 66, at 127; Rubin, *supra* note 54, at 2.

68. See Nagareda, *supra* note 3, at 21; Baetge, *supra* note 66, at 127, 129.

69. See Baetge, *supra* note 66, at 129.

70. See *id.*

71. See *id.*; Rubin, *supra* note 54, at 2.

72. See Nagareda, *supra* note 3, at 22; Harbour & Shelley, *supra* note 6, at 29.

73. See Baetge, *supra* note 66, at 129.

74. See Rubin, *supra* note 54, at 2; Baetge, *supra* note 66, at 127.

Indonesia: Supreme Court Regulation No. 1 (2002)<sup>75</sup>

Defines procedures for class actions authorized under statutes applicable to cases such as environmental management and consumer protection. <sup>76</sup>
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Class may be certified based on (1) the number of class members, (2) commonality of facts and law, (3) adequacy of representative to protect the interests of the group with honesty and seriousness. <sup>77</sup>
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Opt-out procedure. <sup>78</sup>
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Israel: Class Action Law (2006)<sup>79</sup>

Authorizes class actions for proscribed actions, such as product liability, environmental damages, and employment disputes. <sup>80</sup>
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Class representative may be an individual, public agency, or organization. <sup>81</sup>
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Class certification may be granted if:
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(1) the suit raises substantial questions of fact or law common to the class, and there is a reasonable possibility that the decision regarding those will be in favor of the class; (2) a class action is the efficient and appropriate means of resolving the dispute in the circumstances of the case; (3) there exists a reasonable basis to assume that the interests of all the members of the group will be properly represented and managed; and (4) there exists a reasonable basis to assume that the interests of all the members of the group will be represented and managed in good faith. <sup>82</sup>
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Opt-out procedure generally applied. <sup>83</sup>
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Opt-in procedure in representative actions such as claims for bodily harm. <sup>84</sup>
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75. See Mas Achmad Santosa, *Indonesia*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 310, 313 (Mar. 2009).

76. See Otto Cornelis Kaligis, *Class Action Problems and Practical Solutions*, Workshop paper presented at the ASEAN Law Association 9th General Assembly: Challenge of Globalization to Legal Services, at 1, 6 (Bangkok, Nov. 22–26, 2006).

77. See Santosa, *supra* note 75, at 313.

78. See *id.* at 314.

79. See Amichai Magen & Peretz Segal, *Israel*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 244 (Mar. 2009).

80. See *id.* at 247.

81. See *id.* at 249.

82. *Id.* at 247.

83. See *id.* at 248–49.

84. See *id.* at 249.

Italy: Class Action Law (2007)<sup>85</sup>

Authorizes consumer organizations with a national presence, and any other consumer or investor group or association sufficiently representative of collective interests (as determined by the judge) to sue collectively for alleged tort liability, unfair trade practices, or anti-competitive behavior, provided such acts damage the rights of a plurality of consumers and users. <sup>86</sup>
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Opt-in procedure. <sup>87</sup>
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The Netherlands: Act on Collective Settlements (2005)<sup>88</sup>

Developed out of DES litigation. <sup>89</sup>
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Authorizes representative organizations to obtain binding settlements, such as in securities litigation. <sup>90</sup>
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Opt-out procedure. <sup>91</sup>
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Originally aimed at mass injury claims, the law has been used to settle an approximately \$350 million securities claim brought by non-U.S. investors against Royal Dutch Shell PLC in relation to a 2004 restatement of reserves. <sup>92</sup>
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Norway: Dispute Act (2005)<sup>93</sup>

Effective January 1, 2008. <sup>94</sup>
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Allows associations to bring class actions in disputes that concern core values or aims, such as environmental protection, in order to obtain declaratory judgments or judgments for repressive judicial relief. <sup>95</sup>
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85. See Elisabetta Silvestri, *Italy*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 138 (Mar. 2009); Nagareda, *supra* note 3, at 22; Vittorio Scognamiglio, *Italy's New Class Action Law*, MONDAQ, Mar. 27, 2008, available at 2008 WLNR 5818319.

86. See Silvestri, *supra* note 85, at 142; Scognamiglio, *supra* note 85.

87. See Silvestri, *supra* note 85, at 146.

88. See Nagareda, *supra* note 3, at 22; Harbour & Shelley, *supra* note 6, at 28; Ianika Tzankova & Daan Lunsingh Scheurleer, *The Netherlands*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 149 (Mar. 2009).

89. See Tzankova & Scheurleer, *supra* note 88, at 155.

90. See Nagareda, *supra* note 3, at 22; Harbour & Shelley, *supra* note 6, at 28; Bates & Sweeting, *supra* note 20, at 570.

91. See Nagareda, *supra* note 3, at 22; Harbour & Shelley, *supra* note 6, at 28.

92. See Bates & Sweeting, *supra* note 20, at 570.

93. See Camilla Bernt, *Norway*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 220, 223 (Mar. 2009).

94. See *id.*

95. See *id.*

Opt-in procedure, but court may approve an opt-out class action if the individual claims are so small that a considerable majority of them would not be brought as individual claims.<sup>96</sup>

Portugal: Decree-Law (2006)<sup>97</sup>

Allows courts to “practice ‘mass acts’ as long as the actions are somewhat connected and the combined performance of a procedural act or diligence simplifies the court’s task.”<sup>98</sup>

Model case, or test case, may be used by court when “more than twenty actions have been commenced regarding the same material legal relationship, or that number of actions may be decided by application of the same norms to identical situations of fact.”<sup>99</sup>

Opt-in procedure for suspended claims to apply to the court to extend the effects of the model case decision.<sup>100</sup>

Portugal law also provides for representative actions, such as in securities litigation.<sup>101</sup>

South Korea: Securities-related Class Action Act (2005)<sup>102</sup>

Provides remedies for minority shareholders of publicly listed companies in South Korea by “permitting damage claims caused by false disclosures in registration statements or annual reports, as well as insider trading, share price manipulation, and inadequate audits.”<sup>103</sup>

96. *See id.* at 226.

97. *See* Henrique Sousa Antunes, *Portugal*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 161 (Mar. 2009).

98. *Id.* at 162.

99. *Id.*

100. *See id.* at 163.

101. *See id.*

102. *See* Yu-Hsin Lin, *Modeling Securities Class Actions Outside the United States: The Role of Non-Profits in the Case of Taiwan*, 4 N.Y.U. J. L. & BUS. 143 (2007).

103. Shelley Thompson, *The Globalization of Securities Markets: Effects on Investor Protection*, 41 INT’L LAW. 1121, 1142 (2007); *see also* Lin, *supra*, note 102, at 146–47; Walter Douglas Stuber et al., *International Securities and Capital Markets—Developments in 2005*, 40 INT’L LAW. 701, 714 (2006). “The law was amended shortly after its enactment to provide corporate defendants a grace period to correct statements.” Thompson, *supra*, at 1142.

Spain: Civil Procedure Act (2000)<sup>104</sup>

Authorizes groups of individuals and representative organizations to obtain binding settlements. <sup>105</sup>
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Spanish courts consider several factors to determine whether an association is sufficiently representative: number of members; activity and resources; national position; and participation in territorial bodies, such as the Consumer Arbitration System and any international consumer organization. <sup>106</sup>
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Opt-in procedure. <sup>107</sup>
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Sweden: Group Proceedings Act (2003)<sup>108</sup>

Class actions can be brought when: (1) there are common issues of fact, (2) a class action is determined to be the best way to handle the claims, (3) the class can be appropriately defined, and (4) the plaintiff is appropriate to represent the class. <sup>109</sup>
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Opt-in procedure. <sup>110</sup>
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Taiwan: Securities Investors and  
Futures Traders Protection Act (2003)<sup>111</sup>

Grants government-controlled nonprofit organization, the Securities and Futures Investors Protection Center (IPC), a monopoly to bring securities class actions. <sup>112</sup>
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The IPC may bring securities class actions or undertake arbitration (in its own name on behalf of investors) when: “(1) there should be a preoccupation with the public interest; (2) there should be a single event that causes damages to several investors; and (3) there should be
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104. See Lex Mundi, *supra* note 26 (summary by Alejandro Ferreres Comella and Javier Garcia Sanz of the Uría Menéndez law firm); Harbour & Shelley, *supra* note 6, at 28; Pablo Gutiérrez de Cabiedes, *Spain*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 170 (Mar. 2009).

105. See Harbour & Shelley, *supra* note 6, at 28.

106. See *id.*

107. See *id.* at 36.

108. See Nagareda, *supra* note 3, at 23; Harbour & Shelley, *supra* note 6, at 27; Per Henrik Lindblom, *Sweden*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 231 (Mar. 2009).

109. See Nagareda, *supra* note 3, at 23; Harbour & Shelley, *supra* note 6, at 27.

110. See Nagareda, *supra* note 3, at 23; Harbour & Shelley, *supra* note 6, at 27; Välimäki, *supra* note 63, at 3.

111. See Lin, *supra* note 102.

112. See *id.* at 169.

more than 20 investors who delegate their litigation or arbitration rights to the IPC.” <sup>113</sup>
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Opt-in procedure. <sup>114</sup>
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#### IV. EUROPEAN UNION CONSIDERS ADOPTING AGGREGATIVE LITIGATION PROCEDURES

In addition to these individual country developments, the European Union (EU) has recently considered the adoption of some aggregative litigation procedures for Member States.<sup>115</sup> “Arguably the most important impetus to the adoption of class actions at the EU level is the European Commission’s interest in enhancing enforcement of EC antitrust (‘competition’) law.”<sup>116</sup> On December 19, 2005, the Commission published a Green Paper which emphasized the importance of “private as well as public enforcement of antitrust law . . . [to a] competitive economy,” and expressed concern that the current EU system for enforcement was inadequate.<sup>117</sup> The Commission’s Green Paper proposed the adoption of class action provisions to improve enforcement of antitrust rules.<sup>118</sup> A Commission White Paper published in April 2008 contains proposals to facilitate private damages actions in antitrust cases, adding further to the 2005 Green paper.<sup>119</sup> “It is in relation to this area of the law that the greatest leaps in the facilitation of collective redress are expected . . . in the short to medium term.”<sup>120</sup>

Actions that may lead the EU to adopt collective redress procedures for other types of claims are also underway. For instance, on March 13, 2007, the European Commissioner for Consumer Protection urged the adoption of “collective redress” mechanisms by 2012 “for competition

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113. *Id.* at 169–70.

114. *See id.* at 175; *see also* Kuan-Ling Shen & Alex Yueh-Ping Yang, *Taiwan*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 301 (Mar. 2009).

115. *See* Harbour & Shelley, *supra* note 6, at 24.

116. *Id.* at 25; *see also* Christopher Hodges, *European Union Legislation*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 78 (Mar. 2009).

117. Harbour & Shelley, *supra* note 6, at 26 (quoting *Commission Green Paper on Damages Actions for Breach of EC Antitrust Rules*, at 3–4, COM (2005) 672 final (Dec. 19, 2005)).

118. *See id.* at 26.

119. *See* Shankland, *supra* note 14, at 2.

120. *Id.*

infringements and, for example, small claims.”<sup>121</sup> The Commissioner called for consumers to be elevated to “their rightful position as frontline actors of Consumer policy.”<sup>122</sup>

More recently, at a plenary session held on February 13 and 14, 2008, the European Economic and Social Committee (EESC)—a consultative assembly composed of employers, employees and representatives of various other interests—approved its own-initiative opinion to “promote a broad-based discussion on the role and legal arrangements for collective action at Community level, in particular in the area of consumer law and competition law, at least at an initial stage,” while rejecting the features of US-style class actions.<sup>123</sup>

Most recently, on November 27, 2008, the Commission of the European Communities released a Green Paper on Consumer Collective Redress, citing several challenges for consumers seeking redress in Europe.<sup>124</sup> The Green Paper explained:

As a consequence of the weaknesses of the current redress and enforcement framework in the EU, a significant proportion of consumers who have suffered damage do not obtain redress. In mass claim cases that affect a very large number of consumers, although sometimes the harm may be low for the individual consumer, it can be high for the size of the market. As these markets become more cross-border in nature, effective cross-border access to the mechanisms of redress become necessary.<sup>125</sup>

The Green Paper then surveyed existing instruments for consumer redress at the European level, such as recommendations to facilitate alternative dispute resolution and a Regulation on Consumer Protection Cooperation, and found these tools to be inadequate. To address these issues, the Green Paper proposed four options: (1) relying on existing national and European Community measures, but adopting no new European Community action;<sup>126</sup> (2) developing cooperation between the Member States, for example, by creating a collective redress network of entities that have the power to bring a collective redress action in those

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121. Harbour & Shelley, *supra* note 6, at 26.

122. *Id.* at 27.

123. *Opinion of the European Economic and Social Committee on Defining the Collective Action System and Its Role in the Context of Community Consumer Law*, 2008 O.J. (C 162) 3.

124. *See Commission Green Paper on Consumer Collective Redress*, at 2–6, COM (2008) 794 final (Nov. 27, 2008).

125. *Id.* at 5–6.

126. *See id.* at 7.

Member States having such mechanisms;<sup>127</sup> (3) adopting a mix of policy tools, such as improving alternative dispute mechanisms, extending the scope of national small claims procedures to mass claims, extending the scope of the Consumer Protection Regulation, encouraging businesses to improve their handling of complaints, and raising consumer awareness;<sup>128</sup> and (4) a nonbinding or binding EU measure to ensure that a collective redress judicial mechanism exists in all Member States through representative actions, group actions, or test cases.<sup>129</sup>

## V. LITIGATION FUNDING DEVELOPMENTS

“A critical issue for all private civil litigation is how to pay for the litigation.”<sup>130</sup> Outside the United States, “[l]osing parties must pay their opponents’ fees, although often the amount they must pay is determined by the court and may be less than the actual costs.”<sup>131</sup> Contingency or speculative fees paid by plaintiffs to their attorneys have long been prohibited. While the *loser-pays* rule continues to be a barrier to litigation, the traditional barrier against contingency fees “is beginning to fall.”<sup>132</sup>

In the United States, contingency fees in personal injury litigation typically range from “thirty to fifty percent of all recoveries plus costs.”<sup>133</sup> Contingency fees have been described by United States plaintiffs’ lawyers as the “poor man’s keys to the courthouse,”<sup>134</sup> but

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127. *See id.* at 8.

128. *See id.* at 9.

129. *See id.* at 12. The Green Paper suggests the need to reduce litigation costs or make litigation funding more available, but leaves open whether an opt-in or opt-out procedure should be introduced. *See id.* at 12–13. The European Commission set a March 1, 2009 deadline for comments to be submitted on the Green Paper. *See id.* at 14.

130. Hensler, *supra* note 6, at 22.

131. *Id.*

132. *Id.*

133. *See* Hantler, *supra* note 2, at 1141.

134. Robert S. Peck & John Vail, *Blame it on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 N.Y.L. SCH. L. REV. 323, 328 (2006); *see also* Herbert M. Kritzer, *The Wages of Risk: the Returns of Contingency Fee Legal Practices*, 47 DEPAUL L. REV. 267 (1998); John Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U.L. REV. 1567 (1993); *see generally* David Root, Note, *Attorney Fee Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule”*, 15 IND. INT’L & COMP. L. REV. 583 (2005); Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 DEPAUL L. REV. 231 (1998).

opponents have contended that such fees encourage speculative litigation and, in class actions, have allowed some plaintiffs' lawyers to receive a windfall while their clients often receive little by way of actual compensation.<sup>135</sup>

As explained, contingency fee arrangements traditionally have been prohibited in the EU Member States and other foreign countries,<sup>136</sup> and where permitted, "they were used infrequently."<sup>137</sup> The prohibition has "softened recently,"<sup>138</sup> however, and a "number of countries are now exploring whether contingency fees should be permitted in the context of collective litigation."<sup>139</sup>

"Contingency fees are possible in some Canadian provinces," although their use "is not as common" as in the United States.<sup>140</sup> Such fees are also allowed in Argentina,<sup>141</sup> and at least to some extent in "Korea, South Africa, and, surprisingly, in a few European countries."<sup>142</sup> Estonia, Hungary, and Latvia reportedly permit unrestricted contingency fees,<sup>143</sup> while Greece caps such fees at twenty percent.<sup>144</sup> In addition,

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135. For a discussion of problems associated with contingency fees in the United States, see Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65 (2003); Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653 (2003); Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29 (1989); Victor E. Schwartz et al., *Consumer Protection in the Legal Marketplace: A Legal Consumer's Bill of Rights Is Needed*, 15 LOY. CONSUMER L. REV. 1 (2002); see also Angela Wennihan, Comment, *Let's Put the Contingency Back in the Contingency Fee*, 49 SMU L. REV. 1639 (1996).

136. See Chalmers, *supra* note 1; Rubin, *supra* note 54, at 3; Harbour & Shelley, *supra* note 6, at 33; see also W. Kent Davis, *The International Views 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 (1999).

137. Harbour & Shelley, *supra* note 6, at 33.

138. Rubin, *supra* note 54, at 3.

139. Harbour & Shelley, *supra* note 6, at 33; see also Thomas D. Rowe, *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms From Class Actions*, 13 DUKE J. COMP. & INT'L L. 125 (2003); Michael Zander, *Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingency Fees?*, 52 DEPAUL L. REV. 259 (2002).

140. Reimann, *supra* note 5, at 823.

141. See Mairal, *supra* note 29, at 55 ("Contingency fees are allowed provided they do not exceed 40 percent of the economic benefit obtained by the party.").

142. Reimann, *supra* note 5, at 823.

143. See Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 J. TRANSNAT'L L. & POL'Y 281, 287 (2006).

144. See *id.*

forms of contingency fees are reportedly allowed in the Czech Republic, Finland, France, Lithuania, Slovakia, and Sweden.<sup>145</sup>

England and Wales permit “conditional fee arrangement[s]” and after-the-event insurance policies.<sup>146</sup> Conditional fee arrangements do not entitle lawyers in a General Litigation Order plan to receive a percentage share of the proceeds of a claim, as in the United States.<sup>147</sup> Instead, if the action is successful, the plaintiff’s lawyer may obtain a “success fee” (or “uplift”) of up to double the lawyer’s normal fees.<sup>148</sup> The plaintiff’s lawyer receives no fee if the action is unsuccessful.<sup>149</sup> Victoria, Australia has adopted similar measures, but with a smaller “uplift fee.”<sup>150</sup> The conditional fee approach is also reported to be “increasingly common” in Spain.<sup>151</sup>

Several other countries, including Belgium, France, and Japan, outlaw contingency fees but permit a success fee, allowing plaintiffs’ attorneys to be paid a customary hourly rate, regardless of the outcome, as well as an additional payment if the client wins.<sup>152</sup>

Sweden’s 2003 Group Proceedings Act permits attorneys and clients to negotiate “risk agreements” to provide for fees based on a customary hourly rate and set formula (e.g., double the customary hourly rate), subject to court approval based on reasonableness.<sup>153</sup> “If legal fees are

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145. *See id.*

146. *See* Harbour & Shelley, *supra* note 6, at 33; Hodges, *supra* note 53, at 27; Marjorie Holmes & Lesley Davey, *Competition Enforcement in the European Union: A Three-Way Partnership*, 72 DEF. COUNS. J. 31, 34 (2005). *See generally* Stephen E. Kalish, *The English Costs War, 2000–2003, and a Moment of Repose*, 83 NEB. L. REV. 114 (2004). Conditional fee arrangements have effectively replaced the public legal aid system of funding civil litigation in England. *See* Robert Dingwall & Emilie Cloatre, *Vanishing Trials?: An English Perspective*, 2006 J. DISP. RESOL. 51, 65 (2006); Geraint Howells & Rhoda James, *Litigation in the Consumer Interest*, 9 ILSA J. INT’L & COMP. L. 1, 41 (2002); *see also* Richard L. Abel, *An American Hamburger Stand in St. Paul’s Cathedral: Replacing Legal Aid With Conditional Fees in English Personal Injury Litigation*, 51 DEPAUL L. REV. 253 (2001); Geoffrey Woodroffe, *Loser Pays and Conditional Fees—An English Solution?*, 37 WASHBURN L.J. 345 (1998).

147. *See* Harbour & Shelley, *supra* note 6, at 33.

148. *See id.*; Rubin, *supra* note 54, at 4; Murphy & Cameron, *supra* note 5, at 423.

149. *See* Kay Wheat, *Is There a Medical Malpractice Crisis in the UK?*, 33 J.L. MED. & ETHICS 444, 445 (2005).

150. *See* Matthew C. Sullivan, Note, *Tort Reform: Mississippi’s Tort Reforms as Compared to Other Jurisdictions Abroad—A Sensible Treatment for the U.S. Tort System Ills or Not?*, 19 TEMP. INT’L & COMP. L.J. 507, 523 (2005).

151. Reimann, *supra* note 5, at 823.

152. *See id.*

153. *See* Lindblom, *supra* note 108, at 16; Harbour & Shelley, *supra* note 6, at 33;

based solely on the value of the dispute, the agreement is not considered reasonable.”<sup>154</sup>

In July 2006, Italy abolished the former prohibition on contingency fees; Italy also allows lawyer advertising.<sup>155</sup> In Germany, the Federal Supreme Court in March 2007 struck down a statutory prohibition on contingency fee arrangements on constitutional grounds; the court concluded that the ban prevented many citizens from being able to bring claims.<sup>156</sup> As of July 1, 2008, contingency fee arrangements are statutorily permitted within narrow limits.<sup>157</sup> Under Israel’s 2006 Class Action Law, class counsel’s fee is to be determined by the court taking into account the degree of effort expended, out-of-pocket costs, and the total sum awarded to the class as a whole.<sup>158</sup>

In addition to these reforms, at least one country has recently loosened restrictions on litigation funding by third parties. In 2006, Australia’s High Court discarded rules preventing third parties from funding cases, including class actions.<sup>159</sup> Problems arose almost immediately. Now, “Australian courts are considering rules to rein in litigation funders and plaintiff lawyers amid growing concerns about the proliferation of shareholder class actions and the lack of disclosure about the terms of funding agreements.”<sup>160</sup> Among the options being considered would be to require litigants to disclose to the court that they are being funded by a third party and provide a copy of the funding agreement.<sup>161</sup> “Courts would also be able to order funders to provide security for the cost of litigation at the beginning of the proceedings.”<sup>162</sup>

Most recently, the Civil Justice Council (CJC), a nondepartment public body which advises the U.K. government on the continuing

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Rubin, *supra* note 54, at 4.

154. Harbour & Shelley, *supra* note 6, at 33.

155. *See id.*

156. *See id.*; Rubin, *supra* note 54, at 4.

157. *See* Jens Dammann & Henry Hansmann, Globalizing Commercial Litigation, 94 Cornell L. Rev. 1, 17 n. 49 (Nov. 2008) (citing Gesetz zur Neuregelung des Verbots der Vereinbarung von Erfolgshonoraren [Act Modifying the Prohibition of Contingent Fee Arrangements], June 12, 2008, BGBl. I at 1001 (F.R.G.) (providing that contingent fees can be agreed upon only in individual cases and only if the client would, because of his economic situation, reasonably abstain from going to court in the absence of a contingent fee agreement)).

158. *See* Magen & Segal, *supra* note 79, at 44, 46.

159. *See* Marcus Priest, *Crackdown on Class Actions*, AUSTL. FIN. REV., Dec. 7, 2007, at 1, abstract available at 2007 WLNR 24095272.

160. *Id.*

161. *See id.* at 61.

162. *See id.*

reform of the civil justice system, released a Research Paper supporting the possible introduction of U.S.-style contingency fees in the U.K. and the abolition of the U.K.'s traditional loser-pays costs rule.<sup>163</sup> The paper's authors, Senior Costs Judge Peter Hurst and Professor Richard Moorhead of Cardiff University Law School, concluded that although further study is needed—and the U.S. or Canadian systems could not be imported wholesale—there is “considerable confidence that a contingency fee system in England and Wales is viable.”<sup>164</sup> The authors' controversial findings are likely to generate a significant amount of debate, particularly since the paper has been published under the CJC banner.

## VI. PUNITIVE DAMAGES DEVELOPMENTS

Punitive damages are not normal civil or tort law damages. They are not awarded to compensate for harm; that purpose is accomplished by compensatory damages, which provide compensation for both economic losses (e.g., lost wages, medical expenses, and substitute domestic services) and noneconomic losses (e.g., “pain and suffering”). Punitive damages are awarded “to further the aims of the criminal law: ‘to punish reprehensible conduct and to deter its future occurrence.’”<sup>165</sup> They provide a “windfall recovery” for plaintiffs.<sup>166</sup>

The modern Anglo-American common law doctrine of punitive damages dates back to two eighteenth century English cases involving illegal searches and seizures by officers of the Crown.<sup>167</sup> In *Huckle v. Money*,<sup>168</sup> the first case to use the term “exemplary damages,” and its

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163. See RICHARD MOORHEAD, CIVIL JUSTICE COUNCIL, CONTINGENCY FEES: A STUDY OF THEIR OPERATION IN THE UNITED STATES OF AMERICA (Nov. 2008).

164. *Id.* at 6.

165. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 297 (1989) (O'Connor, J., concurring in part and dissenting in part) (quoting *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part and concurring in judgment)).

166. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981).

167. See James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984). “Awarding damages beyond the compensatory was not, however, a wholly novel idea even then, legal codes from ancient times through the Middle Ages having called for multiple damages for certain especially harmful acts.” *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2620 (2008).

168. *Huckle v. Money*, [1763] 95 Eng. Rep. 768 (C.P.).

companion case, *Wilkes v. Wood*,<sup>169</sup> English courts for the first time expressed that “the punitive and deterrent purposes of damages awards could be separated from their compensatory function.”<sup>170</sup> *Huckle* and *Wilkes* were followed by cases approving punitive damages awards in a narrow category of torts involving conscious and intentional harm inflicted by one person on another, such as assault and battery,<sup>171</sup> malicious prosecution,<sup>172</sup> false imprisonment,<sup>173</sup> and trespass.<sup>174</sup> Punitive damages were allowed in these cases to supplement the criminal law system, which in eighteenth century England “punished more severely for infractions involving property damage than for invasions of personal rights.”<sup>175</sup>

The concept promptly crossed the Atlantic to colonial America.<sup>176</sup> As in England, punitive damages were limited to intentional tort cases, such as assault and battery,<sup>177</sup> libel and slander,<sup>178</sup> malicious prosecution,<sup>179</sup> false imprisonment,<sup>180</sup> and intentional interferences with property such

169. *Wilkes v. Wood*, [1763] 98 Eng. Rep. 489 (C.P.).

170. D. Dorsey Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 14 (1982); see also Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233 (1987).

171. See, e.g., *Grey v. Grant*, [1764] 95 Eng. Rep. 794 (C.P.); *Benson v. Frederick*, [1766] 97 Eng. Rep. 1130 (K.B.).

172. See, e.g., *Leith v. Pope*, [1779] 96 Eng. Rep. 777 (C.P.); *Hewlett v. Cruchley*, [1813] 128 Eng. Rep. 696 (C.P.).

173. See, e.g., *Fabrigas v. Mostyn*, [1774] 96 Eng. Rep. 549 (C.P.).

174. See, e.g., *Merest v. Harvey*, [1814] 128 Eng. Rep. 761 (C.P.); *Sears v. Lyons*, [1818] 171 Eng. Rep. 658 (K.B.). Punitive damages also were allowed for seduction, see, e.g., *Tullidge v. Wade*, [1769] 95 Eng. Rep. 909 (C.P.), and for a period they were allowed for criminal conversation (i.e., adultery), see *Duberly v. Gunning*, [1813] 100 Eng. Rep. 1226 (K.B.).

175. James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault On The Citadel*, 14 ST. MARY'S L.J. 351, 355 (1982).

176. The use of “private attorneys general” to sanction antisocial conduct unregulated by the criminal law reached America in 1784. *Genay v. Norris*, 1 S.C.L. 6 (S.C. Com. Pl. Gen. Sess. 1784); see also *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791); David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1263, 1287–88 (1976).

177. See, e.g., *Corwin v. Walton*, 18 Mo. 71 (1853); *Porter v. Seiler*, 23 Pa. 424 (1854); *Lyon v. Hancock*, 35 Cal. 372 (1868); *Ward v. Blackwood*, 41 Ark. 295 (1883).

178. See, e.g., *Sheik v. Hobson*, 64 Iowa 146 (1884); *Louisville & Nashville R.R. Co. v. Ballard*, 85 Ky. 307 (1887).

179. See, e.g., *Brown v. McBride*, 24 Misc. 235, 52 N.Y.S. 620 (Sup. Ct. Queens County 1898).

180. See, e.g., *Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893); *Schlencker v. Risley*, 4 Ill. 483 (1842); *Taber v. Hutson*, 5 Ind. 332 (1854); *Parsons v. Harper*, 57 Va. (16 Gratt.) 64, 74 (1860); *Hamlin v. Spaulding*, 27 Wis. 360 (1869); *Green v. S.*

as trespass and conversion, malicious attachment, or destruction of property,<sup>181</sup> private nuisance,<sup>182</sup> and similar wrongful conduct.<sup>183</sup> In general, punitive damages “merited scant attention,” because they “were rarely assessed and likely to be small in amount.”<sup>184</sup> Typically, punitive damages awards only slightly exceeded compensatory damages awards, if at all.<sup>185</sup>

Beginning in the late 1960s, however, American courts began to allow punitive damages in cases that did not involve intentional misconduct, namely, product liability actions.<sup>186</sup> The simultaneous development of strict product liability and the advent of “mass tort” litigation raised the risk that a defendant could be subjected to repeated imposition of punitive damages for an alleged risk in a *single* product line or a *single* decision. This “perfect storm”—dramatic changes in both punitive damages and product liability law—began to impact the frequency and size of punitive damages awards. For example, until 1976, there were only three reported appellate court decisions upholding awards of punitive damages in product liability cases, and in each case the awards remained modest.<sup>187</sup> Then, in the late 1970s and 1980s, the size of punitive damages awards “increased dramatically”<sup>188</sup> and “unprecedented numbers of punitive awards in product liability and

Express Co., 41 Ga. 515 (1871).

181. See, e.g., *Taylor v. Giger*, 3 Ky. 595 (1808); *Treat v. Barber*, 7 Conn. 274 (1828); *Schindel v. Schindel*, 12 Md. 108 (1858); *Dorsey v. Manlove*, 14 Cal. 553 (1860); *Singer Mfg. Co. v. Holdford*, 86 Ill. 455 (1877); *Bradshaw v. Buchanan*, 50 Tex. 492 (1878); *Huling v. Henderson*, 161 Pa. 553 (1894).

182. See, e.g., *Yazoo & Miss. Valley R.R. Co. v. Sanders*, 87 Miss. 607 (1905); *Schumacher v. Shawhan Distillery Co.*, 178 Mo. App. 361 (1914).

183. See, e.g., *Whipple v. Walpole*, 10 N.H. 130 (1839); *Linsley v. Bushnell*, 15 Conn. 225 (1842); *Pickett v. Crook*, 20 Wis. 358 (1866).

184. Ellis, *supra* note 170, at 2.

185. See, e.g. *S. Kan. Ry. v. Rice*, 38 Kan. 398 (1888) (\$35 costs and fees, \$10 injury to feelings, \$71.75 punitive); *Taylor v. Grand Trunk Co.*, 48 N.H. 304 (1869) (\$500 actual damages, \$858.50 exemplary).

186. In 1967, a California appellate court held for the first time that punitive damages were recoverable in a strict product liability action. See *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689 (1967).

187. See *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975) (\$125,000 compensatory damages, \$50,000 attorneys’ fees, \$100,000 punitive damages); *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689 (1967) (\$175,000 compensatory, \$250,000 punitive damages); *Moore v. Jewel Tea Co.*, 253 N.E.2d 636 (Ill. App. Ct. 1969) (affirming \$920,000 compensatory damages, \$10,000 punitive damages), *aff’d*, 263 N.E.2d 103 (Ill. 1970).

188. George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982).

other mass tort situations began to surface.”<sup>189</sup> The United States Supreme Court said in 1991 that punitive damages in the United States had “run wild.”<sup>190</sup> It has been reported that, between 1996 and 2001, the annual number of punitive damages awards in excess of \$100 million doubled in the United States.<sup>191</sup>

Numerous American states have reacted to these trends by capping punitive damages awards, raising the burden of proof required to obtain a recovery, and providing defenses applicable to certain products, such as pharmaceuticals approved by the United States Food and Drug Administration, to prevent innovation from being chilled and encourage the marketing of socially beneficial products.<sup>192</sup> The United States Supreme Court has also stepped into the fray, issuing a number of decisions in recent years to place broad constitutional limits on punitive damages awards.<sup>193</sup> Most recently, the Supreme Court has imposed stringent limits on punitive damages awards in maritime cases.<sup>194</sup>

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189. John Calvin Jeffries, Jr., *A Comment on The Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986). All United States jurisdictions, except Louisiana, Nebraska, Massachusetts, Michigan, and Washington state permit the award of punitive damages. Michigan permits “exemplary” damages as compensation for mental suffering consisting of a sense of insult, indignity, humiliation, or injury to feelings, but does not permit punitive damages for purposes of punishment.

190. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

191. See John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSN’L L. 391, 393 (2004) [hereinafter Gotanda, *A Comparative Analysis*]; see also David F. Partlett, *Punitive Damages: Legal Hot Zones*, 56 LA. L. REV. 781, 819 (1996):

Jury verdicts are just the tip of the claims process[;] [m]ost cases are settled . . . . Jury verdicts, however, are telling, because they cast a shadow on the entire claiming process. The size and frequency of punitive damages influence the willingness to, and size of, settlements. They also have a gravitational pull on whether claims are lodged in the first place. The greater the value of the claim the more probable it will be initiated. The valuation may even encourage those claims that have a reduced chance of success.

192. See Victor E. Schwartz et al., *Reining In Punitive Damages “Run Wild”: Proposals For Reform By Courts And Legislatures*, 65 BROOK. L. REV. 1003 (2000).

193. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2002); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007).

194. See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2633 (2008) (concluding that “given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio [on punitive to compensatory damages] . . . is a fair upper limit”).

Outside of the United States, punitive damages traditionally have not been much of an issue.<sup>195</sup> They are prohibited in most civil law countries. These countries limit recoveries to compensatory damages, because “punitive damages [are considered] a form of punishment that is appropriate only in criminal proceedings.”<sup>196</sup>

Punitive damages are available in many countries that have been heavily influenced by the British and U.S. legal systems (i.e., Canada, Australia, New Zealand, Ireland, Northern Ireland, South Africa and the Philippines),<sup>197</sup> but awards are less widely available or substantially smaller in size than in the United States. In England and Wales, for example, exemplary damages are available only for oppressive, arbitrary, or unconstitutional action by government servants; injuries designed by the defendant to yield a larger profit than the likely cost of compensatory damages, such as in libel actions; and conduct for which exemplary damages have been authorized by statute.<sup>198</sup> Even in the circumstances where exemplary damages are allowed, they are subject to strict, judicially imposed guidelines.<sup>199</sup> “Canada and Australia allow

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195. See Adam Liptak, *Foreign Courts Wary of U.S. Punitive Damages*, N.Y. TIMES, Mar. 26, 2008, at A1.

196. John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is The Tide Changing?*, 45 COLUM. J. TRANSN'L L. 507, 510 (2007) [hereinafter Gotanda, *Charting Developments*]; Thomas Rouhette, *The Availability of Punitive Damages in Europe: Growing Trend or Nonexistent Concept?*, 74 DEF. COUNS. J. 320, 321–22 (2007); Gotanda, *A Comparative Analysis*, *supra* note 191, at 397; Norman T. Braslow, *The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on the Japanese Experience*, 16 ARIZ. J. INT'L & COMP. L. 285 (1999); Helmut Koziol, *Punitive Damages—A European Perspective*, 68 LA. L. REV. 741 (2008).

197. See Gotanda, *A Comparative Analysis*, *supra* note 191, at 397; Gotanda, *Charting Developments*, *supra* note 196, at 511; Rouhette, *supra* note 196, at 321, 324; Andrew Tettenborn, *Punitive Damages—A View From England*, 41 SAN DIEGO L. REV. 1551 (2004); Christopher Sprague, *Damages for Personal Injury and Loss of Life—The English Approach*, 72 TUL. L. REV. 975 (1997).

198. See *Rookes v. Barnard*, [1964] A.C. 1129 (H.L.); see also *Cassell & Co. v. Broome*, [1972] A.C. 1027 (H.L.); *Exxon Shipping Co.*, 128 S. Ct. at 2623; Gotanda, *Charting Developments*, *supra* note 196, at 510–11; Rouhette, *supra* note 196, at 334.

199. See *Exxon Shipping Co.*, 128 S. Ct. at 2623 (noting that “the Court of Appeals in *Thompson v. Commissioner of Police of Metropolis*, [1998] Q. B. 498, 518, said that a ratio of more than three times the amount of compensatory damages will rarely be appropriate; awards of less than £5,000 are likely unnecessary; awards of £25,000 should be exceptional; and £50,000 should be considered the top”); Gotanda, *A Comparative Analysis*, *supra* note 191, at 402–03 (explaining that in England punitive damages may only be awarded if compensatory damages are inadequate to punish or deter, if the defendant has not already been punished for

exemplary damages for outrageous conduct, but awards are considered extraordinary and rarely issue.”<sup>200</sup>

Recent developments in some Civil Code nations, however, point to greater receptivity toward punitive damages (and the enforcement of foreign awards).<sup>201</sup> For example, in the European Union, a December 2005 Commission Green Paper has raised “the possibility of allowing the doubling of damages in certain antitrust actions.”<sup>202</sup> In Germany, a study by a prominent scholar finds that German courts are beginning to award punitive damages in some civil actions.<sup>203</sup> In France, proposed revisions to the Civil Code have been discussed to allow punitive damages in some civil cases.<sup>204</sup> An Italian court has reportedly awarded punitive damages in two insurance bad faith actions.<sup>205</sup> A recent amendment to Argentina’s Consumer Law allows punitive damages to be awarded up to five million pesos (about \$1.56 million).<sup>206</sup> Thailand recently decided to allow punitive damages to be awarded up to two times the plaintiff’s actual damages.<sup>207</sup>

These actions may not be viewed as alarming for many that do business outside the United States. They are small steps, but they are also steps that many thought would never be taken outside the United States. Given the longstanding compensatory-only tradition of Civil Code countries, it is likely that widespread recognition of punitive

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the same conduct, and when the plaintiff did not cause or contribute to the behavior complained of).

200. *Exxon Shipping Co.*, 128 S. Ct. at 2623.

201. *See, e.g.*, Soh Kee Bun, *Exemplary or Punitive Damages*, 1998 SING. J. LEGAL STUD. 63 (1998).

202. *See* Gotanda, *Charting Developments*, *supra* note 196, at 509; Rouhette, *supra* note 196, at 338.

203. *See generally* Volker Behr, *Myth and Reality of Punitive Damages in Germany*, 24 J.L. & COM. 197 (2005).

204. *See* Gotanda, *Charting Developments*, *supra* note 196, at 509; Rouhette, *supra* note 196, at 326–28.

205. *See* Rouhette, *supra* note 196, at 323. *But see* Francesco Quarta, *Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court’s Veto*, 31 HASTINGS INT’L & COM. L. REV. 753 (2008) (discussing decision by Suprema Corte di Cassazione to block enforcement of judgment of federal court in Alabama to award punitive damages against Italian manufacturer on the ground that the Italian system of civil liability was strictly compensatory).

206. *See* Law No. 26.361 amending Consumer Protection Act 24.240, April 7, 2008, Official Bulletin CXVI, No. 31.378.

207. *See* Chaiporn Supvoranid, *New Era of Thai Consumer Protection*, BANGKOK POST (THAILAND), Sept. 4, 2008, available at 2008 WLNR 16680693.

damages will be slow to develop, and such awards, on average, may never be handed down with the frequency or size as in the United States.

Nevertheless, the converging trends outlined in this article with regard to collective actions and contingency fees, the influence of England on the EU Member States to accept punitive damages, the influence of the United States and the organized personal injury bar,<sup>208</sup> and potential incentives for the use of punitive or penal damages in EU law all suggest possible trends that businesses would be wise to monitor and discuss in the public arena. If, for instance, a greater allowance for punitive damages were coupled with more widespread use of collective litigation, then the potential may exist for very large awards and corresponding impacts on cases that settle.

## VII. CONCLUSION

A growing list of countries outside the United States, including Canada, Australia, most European, and several South American countries, now recognize some form of multclaimant litigation—whether class actions, groups actions, or representative actions by consumer or public organizations. The trend, however, has been to reject wholesale adoption of U.S.-style class actions. What has emerged instead is a distinctly “un-American” approach that generally disfavors opt-out procedures and often allows public bodies and private consumer organizations to bring collective actions in addition to (and sometimes in place of) individuals. Foreign countries also have “not so far been inclined to change other rules that have helped make class action lawsuits practical in the United States.”<sup>209</sup> In particular, there have not been widespread calls to do away with the *loser-pays* rule. Contingent fees and punitive damages remain generally prohibited, but changes are occurring in this area and past prohibitions are softening. The steps taken so far in these two areas, in particular, have been incremental and modest—but a wall is built one brick at a time. If collective actions become more prevalent, and the foreign plaintiffs’ bar better funded and

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208. See, e.g., Brian P. Trainor, *Punitive Damages in Canada: What We Can Learn from the American Experience*, AM. ASS’N FOR JUSTICE (AAJ Annual Convention Reference Material, Vol. 1, Canadian Caucus, July 2007), available at Ann.2007 AAJ-CLE 507 (Westlaw).

209. Siobhan Morrissey, *Vive Les Class Actions: Europe is Showing More Interest in Legal Mechanisms That Have Come Under Fire in the United States*, 91 A.B.A. J. 48, 50 (Sept. 2005).

coordinated as a result, it would not be surprising to hear calls for broader and speedier reform.